IN THE SUPREME COURT OF THE UNITED STATES

CASE NUMBER: 78-6385

OCTOBER TERM, 1979

RECEIVED
JUN 21 1979
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SUPREME COURT, U.S.

FLYNN NOYE HICKS # 94947

Petitioner Pro Se

versus

THE STATE OF OKLAHOMA

Respondent

PETITION FOR WRIT OF CERTIORARI

Certiorari To Review The Final Judgment, Dated April 6, 1979, Case Number F-77-751, Of The Court Of Criminal Appeals Of The State Of Oklahoma

---

Petitioner Pro Se
Flynn Noye Hicks, #94947
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma, 74501

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IN THE SUPREME COURT OF THE UNITED STATES

JUN 21 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

FLYNN NOYE HICKS, #94947)
Petitioner Pro Se)
)
versus) CASE NUMBER: _____
)
THE STATE OF OKLAHOMA)
Respondent)
_____)

PETITION FOR WRIT OF CERTIORARI

NATURE OF THIS PROCEEDING

I

This is a Petition For Writ Of Certiorari By Flynn Noye Hicks, #94947, a State Prisoner, who is serving a term of Forty (40) years for unlawful Distribu-tion of a Controlled Dangerous Substance, After Former Conviction Of Felony. The said Forty (40) year sentence is being served in the Oklahoma State Penitent-iary, Post Office Box 97, McAlester, Oklahoma, 74501.

II
THE OPINION BELOW

The Opinion Below dated March 8, 1979, is an unpublished Order Of the Oklahoma Court Of Criminal Appeals, Case Number P-77 751, affirming the final Judgment in Case No. CRF 76-4597 of the District Court Of Oklahoma County, Oklahoma. On March 23, 1979 a Petition For Rehearing was filed and, subsequently, on April 6, 1979 the said Petition For Rehearing was denied. Xerox Copy of the Order Affirming the Petitioner's Direct Appeal in Case No. F-77-751 is attached herewith as Petitioner's Exhibit #1 and a xerox copy of the Order Denying the Petition For Rehearing is attached herewith as Petitioner's Exhibit #2.

III
JURISDICTIONAL STATEMENT

The statement of the grounds on which the Jurisdiction of this court is invoked is as follows. The Petitioner Flynn Noye Hicks alleges that he is being

deprived of his LIBERTY in violation of the Due Process Cluase of the 14th Amendment. Specifically, the Petitioner alleges that, among other things, the trial c court gave an instruction based upon an invalid Oklahoma Statute (Title 21 O.S. Section 51(b)). The trial court instructed the jury that there was only one mandatory sentence which was Forty (40) years. Under the Oklahoma Statute involved, Title 21 O.S. Section 51(b), the sole sentence to be imposed was a "Mandatory Term of Forty (40) years." Thus, the jury was compelled under the trial court's instructions to imposed a mandatory Forty (40) yeer Term. The Petitioner alleges, because the said Oklahoma Statute Title 21 O.S. Section 51(b) was subsequently declared null and void, that (1) the trial court's instructions denied him due process of law, (2) the verdict of the jury denied him due process of law, and (3) the manner in which the Forty (40) year sentence was imposed denied him due process of law as the same is provieded by the Due Process Clause of the 14th Amendment.

Also, under the facts and circumstances of this instant case the Petitioner was denied the Equal Protection of the laws by the action of the trial court and by the action of the Oklahoma Court Of Criminal Appeals.

The date of the final Judgment #F-77-751 is March 8, 1979 and the date of the order denying rehearing is April 6, 1979. No extension of time has been sought becuase there is no need for an extension of time.

Since the Oklahoma Court Of Criminal Appeals is the highest State Court: it is believed by the Petitioner that this court has Jurisdiction under Title 28 U.S.C. Section 1257.

IV
QUESTIONS OF LAW PRESENTED FOR REVIEW

#1 ..... The first question presented is whether, under the facts and circumstances involved in this instant case, the mandatory Forty (40) year Sentence was imposed in a manner that violates the following provisions of the 14th Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of * * , LIBERTY, or * * without due process of law"?

#2 ..... The second question presented is (1) whether the action of the trial court and (2) whether the action of the Oklahoma Court of Criminal Appeals denied the petitioner the Equal Protection of the laws since the said Oklahoma Statute Title 21 O.S. Section 51(b) was declared null and void on October 14, 1977 in THIGPEN V. STATE, Okl. Cr., 571 P.2d 467 as a matter of Constitutional law?

V
FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED
14th AMENDMENT, UNITED STATES CONSTITUTION

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unitedd States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, LIBERTY, or propetty without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OKLAHOMA STATUTE INVOLVED
Title 21 Oklahoma Statutes Supp. (1977) Section 51 (b)

"Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death.

VI
STATEMENT OF FACTS
and
STATEMENT OF THE CASE

The conviction here resulted from a Jury Trial on April 21, 1977 in Case no. CRF-76-4597 from the District Court Of Oklahoma County, Oklahoma, before the Hon, Charles Owens, District Judge.

The petitioner, Flynn Noye Hicks, (hereafter referred to as defendant) and Diane Elisabeth Jones were charged by the State Of Oklaahoma with the offense of Unlawful Distribution of a Controlled Dangerous Substance in violation of 63 O.S. Supp. 1976 § 2-401. The defendant Hicks, for whom this certiorari petition is lodged, received a sentence of forty years in the State Penitentiary after

his conviction in Oklahoma County on April 21, 1977.

STATEMENT OF FACTS

In the initial phase of the trial, the State called three witnesses: Eugene Major, Malcom J. Atwood, and Dennis Goodpasture. The defendant called Brent Barnes; who was not allowed to testify.

Mr. Major, who is employed by an Oklahoma Multi-County Intelligence Agency, testified that on October 5, 1976, he met with Agents Beshearer and Atwood at a local motel to determine whether he would conduct an investigation that day. Following their discussions, he picked up a confidential informant in northeast Oklahoma City. He testified that he went to Tate's Grocery Store and parked his car on the North Side of the street. He further testified that he was approached by a black male, identified as the defendant, who engaged in conversation with him. The witness stated that he told the defendant that he had "not scored". According to the witness, defendant stated that he might help him get some and requested that the witness remove his car. After this conversation, the defenant left. Mr. Major also left when the confidential informant came and asked to be taken to a phone booth. When Major returned, he reported seeing a car parked two blocks away whichwas occupied by two females. Major testified that the defnedant went to the car, came back and indicated that something was available. The defendant then allegedly had a balloon in his hand which he sold to Major for $25. Major further testified that he purchased a second balloon from the co-defendant Diane Jones.

On cross-examination, the witness admitted that he had no plan for investigation, but only went out "cold" that day. He further testified that he and the defendant did go to a house three or four blocks away; and that he did not know whose house it was. He said that the confidential informant remained on 23rd street when he and defendant went to the house. Upon questioning by the defense attorney, Major admitted that he had testified before Judge Dudley in preliminary hearing on the 11th of January, 1977, on this matter. When asked about inconsistencies concerning the confidential informant and evidence, he stated that he thought it was a mistake of the court reporter.

The State next called Agent Malcolm John Atwood. Under direct examination he stated that he worked for the Bureau of Narcotics and Dangerous Drugs of Oklahoma. He further testified that he met with officer Major on the Day in question, but that Major left to pick up a confidential informant. He followed Major but quickly lost track of him. It was not until about 40 minutes later that he saw Major at the motel. There, he tested the balloons given to him by Agent Major utilizing a field test and obtained positive results.

During cross-examination, the witness admitted that he lost sight of Agent Major and that he did not see anyone in the car with him, althought he expected the x informant to be there. He also testified that he could not see the transaction described by witness Major.

Dennis Goodpasture, a chemist with the Oklahoma State Bureau of Investigation stated that he tested the contents of the envelopes. He further stated that the contents contained heroin.

Over objection by the defendant, the Court permitted the State to recall Agent Major. The witness testified that his initials were on the evidence envelope along with the date. He again testified tht the evidence was received from the defendant.

On cross-examination the attorney for the defendant elicited the admission from the witness that he talked to the Prosecutor, Agents Beshearer and Atwood before returning to the witness stand.

The State was also permitted, over objection, to recall Malcom Atwood. He was questioned concerning the identity of the co-defendant and the evidence envelopes.

The defense called Brent Barnes, who testified that he is a Certified Shorthand Reporter who worked for Judge Dudley, on January 11, 1977, during the preliminary hearing for the defendant. When the defense attempted to ask him questions concerning the transcript, the State objected on the grounds that the transcript had not been filed. The witness testified that he took the transcript to the Clerk's office and turned it in, and to the best of his knowledge, it was filed. After a hearing in chambers, the Court decided to sustain the State's motion and not allow the witness to testify.

The defense called no other witnesses and then rested.

The question of law was raised on Direct Appeal, see Petitioner's Exhibit #1, page #2, and the question was raised again the the Petition For Rehearing. The Oklahoma Court Of Criminal Appeals said, see Petitioner's Exhibit #1, page #2, line #27:

Hon. Hez Bussey ..... "Defendant asserts in his 4th assignment of Error that
Judge Title 21 O.S. Supp. (1977) Section 51(b), under which he was sentenced is unconstitutional. We agree. This question was laid to rest by this Court in Thigpen v. State, Okl. Cr., 571 P.2d 467. We must find however, that the defendant was not prejudiced by the use of this Statute in that sentence imposed is within the range of punishment authorized by the provisions of Title 21 O.S. Supp. (1977) Section 51(a)."

In compliance with Rule #23(1)(F) (of the Rules of this court) the manner in which the lower-court ruled on the question presented is shown above. Thus, the stage of the proceedings where the Question Presented was raised for the first time is shown above, also, the manner in which the court ruled on the Question Presented is shown.

The Petition For Rehearing was denied on April 6, 1979 and from this Order (since it is the finally Judgment of the State Court) the petitioner seeks to have this Final Judgment reviewed by a Petition For Writ Of Certiorari.

VII
ARGUMENT

#1..... When the sentence of Forty (40) years was imposed, the Procedure employed by the trial court denied the defendant Flynn Noye Hicks due process of law.

#2..... The Trial Court's instructions to the jury that a sentence of Forty(40) years was mandatory denied the defendant both due process of law and the equal protection of the laws.

#3..... Under the facts and circumstances of this case; the mandatory sentence here of Forty(40) years violates both the 8th and 14th Amendments.

In support of his argument, the petitioner points out an Excerpt From The Opinion Below of the Oklahoma Court Of Criminal Appeals #F-77-[illegible]
See Petitioner's Exhibit #1, page #2, line #27.

Hon. Hez Bussey..... "Defendant asserts in his 4th Assignment of Error that
Judge Title 21 O.S. Supp. (1977) Section 51(b), under which he was sentenced is unconstitutional. We agree. This question was laid to rest by this court in Thigpen v. State, Okl. Cr., 571 P.2d 467. We must find, however, that the defendant was not prejudiced by the use of this Statute, in that, the sentence imposed is .. within the range of punishment authorized by the provisions of Title 21 O.S. Supp.(1977) Section 51(b)."

As shown after admitting that the defendant was sentenced under Section 51(B) of of Title 21 Hon Hez Bussey affirmed the punishment under Section 51(a) even thought the defendant was tried under Section 51(B). The petitioner urges that an error committed Section 51(b) can not be justified by the language under Section 51(A), for, the petitioner was tried, convicted, and sentenced under Section 51(B).

The trial court read the Instructions to the jury (see Tr. 171). In so doing, the trial court instructed the jury that a sentence of Forty(40) years was "Mandatory". The said Instruction is out below.

See..... "Instruction #4 .....

Hon. Charles Owens.... "You are instructed that as to the defendant Flynn Noye
Trial Court Hicks the law provides that every person, who, having been twice convicted of a Felony offenses, commits a third, or thereafter, felony offense within ten (10) years of date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of Twenty(20) years plus the longest imprisonment for which the said third, or subsequent term was punishable, had it been a first offense. Under thefacts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense . within ten (10) years of the completion of both the previous offenses, then you shall assess his punishment at Forty(40) years imprisonment in the State Penitentiary."

/s/ Hon. Charles Owens, District Judge
Dated April 12th, 13th and 14th, 1977

In his Closing Argument the prosecutor explited the above Instruction #4

in the following way and manner: see Transcript #CRF 76 4597, page #172, line #14...

PROSECUTOR....."Its mandatory the legislature said, as your Honor read to you in the Instruction. And the Judge sets the law out, I don't and the other attorney don't. It is mandatory that they get Forty (40) years if you find that he has been convicted of two (2) felonies before."

* * * * * * * * * * *

(continue on page #173, line #17) ....

PROSECUTOR....." * * * , and a term of Forty (40) years as set out in the Statutes as mandatory by the State Legislature."

(continue on page #179, line #18)....

PROSECUTOR..... ** * * * *. The court's Instruction were that under number Four, you may like to read this:

'Under the facts of this case this means that , should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten (10) years of the completion of both of the previous offenses, then you shall assess his punishment at Forty (40) years imprisonment in the State Penitentiary.'

Fourty (40) years. I don't see how he can tell you to ignore the two previous felony convictions. You have heard the testimony. He even stipulated."

(continue on page #180, line #13)

* * * * * * * *

PROSECUTOR.....** * * *. The law says that xx two previous convictions, then is shall be Forty (40) years."

The Oklahoma Legislature did enact the "Mandatory" sentence Statute; see Title 21 O.S. Supp. (1977) Section 51(B). However, on October 14, 1977 the Oklahoma Court Of Criminal Appeals struck down Section 51(B) as being unconstitutional: see Thigpen v. State, Okl. Cr., 571 P.2d 467. Thus, when the trial court here read Instruction #4 to the jury a constitutional error was committed and, when the prosecutor exploited the constitutional error by commenting upon the said Instruction #4, the error compounded.

Also, when the Oklahoma Court Of Criminal Appeals refused to correct the error....the said error again compounded.

It is believed by the petitioner that the error violated the following provisions of the Federal Constitution.

See.....14th Amendment, United States Constitution

* * * * * . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall ny State deprive any person of life, LIBERTY, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If the Petitioner Flynn Noye Hicks is correct that the error did violate the above provisions of the 14th Amendment, in that event, the said mandatory sentence of Forty (40) years is void.

Under different facts and circumstances this court recently struck down "Mandatory Santences" in the following cases.

See....WOODSON V. NORTH CAROLINA, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944

or see ... COKER V. GEORGIA, 439 U.S. 584, 97 S.Ct. 2861, 53L.Ed.2d 982

However, on January 8, 1979, this court refused to strike down the New York mandatory life sentence for certain drug convictions.

See.... CARMONA V. WARD, 439 U.S. ____, 99 S.Ct. 874, 58 L.Ed.2d ____, No. 78-5531...

The defference between this instant case and Carmona v. Ward, supra is that here the highest State Appellate court has already struck down the statute involved.

Thus, the issue here is whether the PROCEDURE (employed by the trial court to obtain the Forty (40) year mandatory sentence) violated the Due Process Caluse and violated the Equal Protection Clause. To be sure, the Petitioner Flynn Noye Hicks urges that here the PROCEDURE itself violated his Federal Constitutional right to Due Process of Law and also violated his right to the Equal Protection of the laws. In support of this argument

See.....LEE V. STATE, Okl. Cr., 572 P.2d 260 where relief was granted under Thigpen v. State, Okl. Cr., 571 P.2d 467. The Petitioner Flynn Noye Hicks is entitled to similar relief here. In Oklahoma the Thigpen-Case supra is a precedent entitled to binding weight...yet, the court did not afford the Petitioner here the relief that was afforded to all other persons similarly situated.

The Petitioner Flynn Noye Hicks is entitled to a new sentencing trial, or a new penalty stage, under the cases that have been handed down by this court: see UNITED STATES V. JACKSON, 390 U.S. 570, 88 S.Ct. 1209, 20L.Ed.2d 138. In contrast to the facts here, there are other cases where mandatory sentences were imposed and each case is distinguishable from the facts here. See for example BORDENKIRCHER V. HAYES, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 and CORBITT V. NEW JERSEY, 439, U.S. ____, 99 S.Ct. 492, 58 L.Ed.2d ____, or see GARDNER V. FLORIDA, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 and, last, wee HRESNELL V.

V. GEORGIA, 439 U.S. ____, 99 S.Ct. 235, 58 L.Ed.2d ___. The above cases are instructive for the following reasons. Here, the "Mandatory" sentence Forty (40) years was imposed as a result of an unconstitutional Statute. This single factor distinguishes the FACTS here form many of the above cases.

The failure of that trial court and the failure of the Oklahoma Court Of Criminal Appeals to grant relief denied the Petitioner Flynn Noye Hicks the equal protection of the laws since relief was granted in both Thigpen v. State, Okl. Cr., 571 P.2d 467 and Lee v. State, Okl. Cr., 572 P.2d 260. In Oklahoma all other persons similarly situated were granted relief, see Lee v. State, Okl. Cr., 572 P.2d 260.

A sentence violates the 8th and 14th Amendments if much a sentence can be classified as follows:

> "A punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out proportion to the severity of the crime."
> cited from COKER V. GEORGIA, 433 U.S. at 592, 97 S.Ct. at 2861, 53 L.Ed.2d 982, and from CARMONA V. WARD, 439 U.S. at ____, 99 S.Ct. at 877, 58 L.Ed.2d _____.

For all of these reason this court is asked to grant certiorari and to thereafter grant the relief prayed for in the Petitioner's Prayer For Relief.

VIII
PRAYER FOR RELIEF

The Petitioner Flynn Noye Hicks prays that this court will (1) grant a Writ Of Certiorari to review the final Judgment #F-77-751 of the Oklahoma Court Of Criminal Appeals, (2) appoint an attorney to represent the petitioner in this Court, (3) hold Oral Arguments, and (4) vacate final Judgment #F-77-751 of the State Court with instructions vacate the Petitioner's Forty (40) years and thereafter allow to allow the petitioner an opportunity to be heard at a new penalty trial prior to the imposition of any new sentence.

IX
CONCLUSION

WHEREFORE the petitioner prays that the court will grant relief as set out in the Petitioner's Prayer For Relief. It is so Prayed.

Respectfully submitted

Flynn Noye Hicks #94947
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma 74501

X
VERIFICATION

STATE OF OKLAHOMA)
) ss:
COUNTY OF PITTSBURG)

Flynn Noye Hicks, after being first sworn under oath, affirms that the above Petition For Writ Of Certiorari is true and correct to the best his knowledge, belief, and memory.

Flynn Noye Hicks
Affiant, Flynn Noye Hicks

Subscribed and sworn to before me
this 18th day of June, 1979.
D. Martin
Notary Public
My Commission expires: 1-25-83

XI
PROOF OF SERVICE

On June ____, 1979 I mailed a copy of the above instrument to attorney General of Oklahoma, Jan Eric Cartwright, 112 State Capitol Building, Oklahoma City, Oklahoma, 73105.

Flynn Noye Hicks
Petitioner Pro Se

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 8 1979
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FLYNN NOYE HICKS,)
Appellant,)
-vs-)
THE STATE OF OKLAHOMA,)
Appellee.)

NOT FOR PUBLICATION

No. F-77-751

AUTHORIZED FOR FILING
MAR 8 1979
COURT OF CRIMINAL APPEALS

- O P I N I O N -

BUSSEY, Judge:

Appellant, Flynn Noye Hicks, hereinafter referred to as defendant, was convicted in the District Court, Oklahoma County, Case No. CRF-76-4597, of Unlawful Distribution of a Controlled Dangerous Substance, in violation of 63 O.S.Supp.1976, § 2-401, After Former Conviction of Felonies to wit: Burglary in the Second Degree and Assault and Battery With a Dangerous Weapon With Intent to do Bodily Harm. At the trial the State proved that Eugene Major, of the Multi-County Intelligence Agency, purchased a balloon of heroin from the defendant, and another from Dianne Jones, a codefendant on October 5, 1977.

Defendant asserts in his first assignment of error that the trial court erred in not permitting him to impeach the testimony of Agent Major by the use of a prior inconsistent statement. At the trial Major testified that prior to meeting the defendant he picked up a confidential informant. The defendant wished to call as a witness the court reporter from the preliminary examination, to testify that Major had said at that time that there was no informer. But at the trial Major also testified that he let the informer out of the car before he met the defendant, and that the informer was not present during any of the transaction.

In Oklahoma a witness may not be impeached by the use of inconsistent statements as to collateral matters. Tarter v. State, Okl.Cr., 350 P.2d 596 (1961). Since the informant in the instant case was not present at the time Major bought the heroin, the issue of his existence was a collateral matter. Therefore the trial court's ruling was correct, and this assignment of error is without merit.

Defendant contends in his second assignment of error that the trial court erred by refusing to permit the court reporter to verify the accuracy of the transcript. We agree with the defendant's contention that a court reporter may be called to verify a transcript prepared by him. See Lewis v. State, Okl.Cr., 458 P.2d 309 (1969). We must find the error to be harmless, however, since we have found that its intended use to impeach the witness Major as to a collateral matter would have been improper.

Defendant urges in the third assignment of error that the trial court erred in invoking the rule of sequestration and then allowing the State to recall witnesses Major and Atwood. We have consistently held that it is within the discretion of the trial court to allow or exclude the testimony of a witness who has violated such rule. See Kilgore v. State, 10 Okl.Cr. 446, 137 P. 364 (1914) and Slaughter v. State, Okl.Cr., 236 P.2d 993 (1951). Absent a more definitive showing by defendant demonstrating an abuse by the trial court of its discretion in permitting the witnesses to testify, we must find this assignment of error to be without merit.

Defendant asserts in his fourth assignment of error that 21 O.S.Supp.1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in Thigpen v. State, Okl.Cr., 571 P.2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the

range of punishment authorized by the provisions of 21 O.S.Supp. 1977, § 51(A).

Defendant next contends that he did not receive a fair trial because of the improper remarks of the prosecuting attorney. We have carefully examined each of the alleged improper remarks and observe that on only one occasion did defendant object to the remarks. In that instance, the defendant failed to request that the jury be instructed to disregard the remark. We have repeatedly held that when an objectional statement is made by the prosecution, it should be called to the attention of the court by timely objection, together with a request that the jury be instructed to disregard the improper statement and in the event that the objection is overruled, an exception should be taken to the ruling of the Court, preserved and argued in the motion for new trial. When this is not done, the defendant is deemed to have waived any objection unless the remarks are so fundamentally prejudicial that the court cannot by instructions to the jury correct such error. See Neal v. State, Okl.Cr., 506 P.2d 936 (1976) and Kern v. State, Okl.Cr., 522 P.2d 644 (1974). Finding that the remarks were not so fundamentally prejudicial that they could not have been cured by instruction to the jury, we are of the opinion that this assignment of error is without merit.

Defendant finally contends that the accumulation of errors were so prejudicial as to justify reversal. Inasmuch as we have found defendant's preceding assignments of error to be without merit, it necessarily follows that this assignment of error is also without merit.

The judgment and sentence is accordingly AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE CHARLES L. OWENS, JUDGE,

FLYNN NOYE HICKS, appellant, was charged and convicted for the offense of Unlawful Distribution of a Controlled Dangerous Substance;

was sentenced to forty (40) years' imprisonment, and appeals. Judgment and sentence AFFIRMED.

JOHN T. ELLIOTT,
PUBLIC DEFENDER OF OKLAHOMA COUNTY,
DAVID W. LEE, ASST. PUB. DEFENDER,
JANE F. WHEELER,
Attorney for Appellant,

LARRY DERRYBERRY, ATTORNEY GENERAL,
JOE H. ENOS, ASST. ATTY GEN.,
Attorneys for Appellee.

OPINION BY BUSSEY, J.
CORNISH, P. J. AND BRETT, J. CONCUR.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 6 1979
Ross N. Lillard, Jr.
CLERK

FLYNN NOYE HICKS,)
Appellant,)
-vs-) No. F-77-751
THE STATE OF OKLAHOMA,)
Appellee.)

ORDER DENYING PETITION FOR REHEARING
AND ISSUANCE OF MANDATE FORTHWITH

On the 23rd day of March, 1979, a Petition for Rehearing was filed in case number F-77-751. After thorough consideration of the issues raised and the authorities cited, we are of the opinion that the Petition for Rehearing should be denied.

IT IS THE FURTHER ORDER of this Court, that the Mandate issue FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this 6th day of April, 1979.

TOM R. CORNISH, PRESIDING JUDGE

TOM BRETT, JUDGE

HEZ J. BUSSEY, JUDGE

ATTEST:

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
JUN 21 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1979

CASE NUMBER 78-6885

FLYNN NOYE HICKS #94947
PETITIONER PRO SE

-VS-

THE STATE OF OKLAHOMA
RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now the petitioner Flynn Noye Hicks and states that he is a poor person unable to pay the filing fees and other costs, and that he is without friends, or relatives, willing or ablt to pa y such costs for him. And that, unless the court grants him leave to proceed as a poor person under Title 28 U.S.C. Section 1915, he will be unable to proceed. In support the petitioner has attached his affidavit of poverty.

Respectfully Submitted,

Flynn Noye Hicks #94947
Oklahoma State Penitentiary
Post office Box 97
McAlester, Oklahoma, 74501

78-6883

AFFIDAVIT OF POVERTY

RECEIVED
JUN 21 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) ss

Flynn Noye Hicks, after being first sworn under oath, deposes and states that:

1)..... The Petition for Writ of Certiorari is litigated in good faith, for, the petitioner truly believes that he is entitled to the relief requested in the petition.

2)..... The petitioner is without sufficient funds to prepay the filing fees and other costs and, unless the court grants leave to proceed as a poor person, the petitioner will not be able to proceed.

3)..... The nature of the grounds is as follows:

SUB'D...(a)... During the course of the petitioner's jury trial the trial court instructed the jury that a sentence of Forty (40) years was "Mandatory". Because of Oklahoma statute that is involved here was subsequently declared null and void as a matter of constitutional law; the petitioner Flynn Noye Hicks alleges that he was denied due process of law by the Instruction that a sentence of forty (40) years was mandatory.

The petitioner affirms that the above affidavit of poverty is true and correct to the best of my knowledge, belief and memory.

Affiant Flynn Noye Hicks #94947
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma, 74501

Subscribed and sworn to before me this 18 day of June, 1979.

Notary Public A. Martin

My Commission Expires: 1-25-83

PROOF OF SERVICE

On June_____, 1979, I mailed a copy of the above instrument to Jan Eric Cartwright, Attorney General of Oklahoma, 112 State Capitol Building, Oklahoma City, Oklahoma, 73105

Flynn Noye Hicks
Petitioner Pro Se

Supreme Court, U. S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,

Petitioner,

—*v.*—

THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED JUNE 21, 1979
CERTIORARI GRANTED NOVEMBER 26, 1979

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,

Petitioner,

—*v.*—

THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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RELEVANT DOCKET ENTRIES

IN THE DISTRICT COURT, OKLAHOMA COUNTY STATE OF OKLAHOMA

No. CRF-76-4597

STATE OF OKLAHOMA

vs.

DIANNE ELIZABETH JONES, a/k/a DIANNE HOLMES & FLYNN NOYE HICKS

Date	Entry
4-12-77	Ent: Case comes on for trial. State app. through Dist. Atty. Leonard Gebb. Deft's app. in person and by counsel's Bill. Page, James Pierceson. Both sides announce ready. Jurors called to box and sworn to answer questions. Jury sworn to try case. opening statements by pltf. and defts. Witnesses sworn evidence introduced. Trial cont. to April 13, 1977 at 9:00 Am. owens
4-13-77	Ent: Comes on for cont trial from 4-12-77. Witnesses sworn pltf. and deft. rest. court instructs Jury, argument jury retires to deliberate & return to box with verdict's of Flynn Noye Hicks guilty of unlawful distr. of a controlled dangerous subst. signed by foreman Anthony Walker. Dianne Elizabeth Jones guilty of unlawful distr. of a controlled dangerous subst. signed by foreman Anthony Walker. Jury retires to deliberate on second stage & return to box with verdicts of Flynn Noye Hicks guilty of unlawful distr. of a controlled dangerous subs. after been previously convicted of two felony offenses & assess his punishment at imprisonment in the State Penit. for a term of 40 years. Signed by foreman Anthony Walker. Have previously found the deft. Dianne Elizabeth Jones guilty of unlawful dist. of a controlled dangerous subst. & we now assess her punishment at impris. for a term of 5 years & a fine of $1,000.00 signed by foreman Anthony Walker. Owens

Date	Entry
4-14-77	Filed true verdict 11-589
4-14-77	Filed true verdict 11-638
4-14-77	Filed true verdict 11-588
4-14-77	Filed true verdict 11-587
4-14-77	Filed courts inst. (second charge)
4-21-77	Ent: Deft. Flynn Hicks present in person and by counsel, James Pearson. State by Leonard Gebb. Comes on for hearing on mot. for new trial and for sent. Mot. for new trial overruled, exceptions allowed. Deft. comes on for sent. It is the judg. and sent. of the court that the deft. Flynn Hicks be confined in the state penit at McAlester, Okla., for a period of forty years. Sent. to begin on delivery to the warden. All of to which the deft. excepts and exceptions are allowed, and the deft. files in open court written notice of intention to appeal to the court of criminal appeals, and makes written request for a transcript. Clerk directed to note same on appearance docket. Deft. given six months to perfect appeal. Appeal bond set in the amount of $25,000.00
4-21-77	Filed design. of record on appeal
4-21-77	Filed not. of appeal and request for trial record at pub. exp.
4-21-77	Iss. judg. and sent. 12-2256 Owens
5-9-77	Filed Bound Record for appeal to Court of Criminal Appeals (not including transcripts)
8-10-77	Filed Supplemental Desig of Record

RELEVANT DOCKET ENTRIES

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. F-77-751

FLYNN NOYE HICKS, APPELLANT,

vs.

STATE OF OKLAHOMA, APPELLEE.

Date	Entry
Oct. 21, 1977	Leave to file w/out costs, Bussey, P.J. Petition in Error Original Record (one legal length folder of 36 pp) Transcript (one Bound Volume of 208 pp) Copy to A.G. Issue Certificate of Appeal
May 5, 1978	JE: Order, Bussey, P.J.—Submitting cause, copies to attys.
Mar. 8, 1979	JE: Opinion: Affirmed Bussey, J. Copies to Attys; Hon. Charles Owens; Press: Not for Publication; Public Defender, Okla. County, Cert. #156074
Mar. 23, 1979	Appellant (pro se) Petition for Rehearing
Apr. 6, 1979	JE: Order, Cornish, P.J., Brett, J., & Bussey, J. Order Denying Petition for Rehearing and Issuance of Mandate Forthwith—copies to Attys. & appellant pro se
Nov. 30, 1979	Copy of Order of Supreme Court of U.S. /s/ Michael Rodak, Jr., Granting Certiorari.

IN THE DISTRICT COURT, IN AND FOR
OKLAHOMA COUNTY, STATE OF OKLAHOMA

CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

DIANNE ELIZABETH JONES and FLYNN NOYE HICKS,
DEFENDANT.

INFORMATION

In the name and by the authority of the State of Oklahoma, comes now ANDREW M. COATS the duly appointed, qualified and acting District Attorney in and for Oklahoma County, District No. 7, State of Oklahoma, and on his official oath gives the District Court in and for said Oklahoma County, State of Oklahoma, to know and be informed that theretofore, to-wit:

On or about the 5 day of October A.D., 1976, in Oklahoma County, State of Oklahoma

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS

whose more full and correct names are to your informant unknown, then and there being, did then and there willfully, unlawfully and feloniously commit the crime of

UNLAWFUL DISTRIBUTION OF A CONTROLLED
DANGEROUS SUBSTANCE—HEROIN
(63 O.S.A. 2-401)

in the manner and form as follows, to-wit:

That is to say, the said defendants, acting conjointly and together, in the county and state aforesaid, and on the day and year aforesaid, then and there being, did then and there wilfully, unlawfully, wrongfully and

feloniously distribute a controlled dangerous substance, to-wit: HEROIN in the form of a brown powdery substance, by selling the same to one E. MAJOR for the sum of $50.00 good and lawful money of the United States of America, paid to the said defendants by the said E. MAJOR; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Oklahoma.

ANDREW M. COATS
District Attorney
District No. 7
Oklahoma County, Oklahoma

By /s/ James R. McKinney
JAMES R. MCKINNEY
Assistant District Attorney

STATE OF OKLAHOMA, OKLAHOMA COUNTY, SS.:

I, J. BIRDSONG, being duly sworn on my oath, declare that the statements set forth in the above information are true.

/s/ J. Birdsong

Subscribed and sworn to before me this 15 day of December, 1976.

DAN GRAY, County Clerk

By /s/ [Illegible]
Deputy

[SEAL]

I, the undersigned District Attorney of the Seventh Judicial District, Oklahoma County, State of Oklahoma, do upon my official oath, further give the said Court to know and be informed that the offense of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE, HEROIN as charged in the within Information was committed by the defendant, FLYNN NOYE HICKS, names therein, after he had been convicted of the following crime punishable by imprisonment in the State Penitentiary:

BURGLARY IN THE SECOND DEGREE on the 4th day of June, 1970 in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-70-1250;

ASSAULT AND BATTERY WITH A DANGEROUS WEAPON WITH INTENT TO DO BODILY INJURY on the 21st day of October, 1975 in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-75-2198.

ANDREW M. COATS,
District Attorney

By /s/ James R. McKinney
JAMES R. MCKINNEY
Assistant District Attorney

I, DAN GRAY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 2 day of Jan., 1980.

DAN GRAY
Court Clerk

By /s/ [Illegible]
Deputy

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

COURT'S INSTRUCTIONS (Second Charge)

No. 1

Members of the Jury:

In the second portion of the charge set out in the Information in this case, the State alleges the following:

I, the undersigned District Attorney of the Seventh Judicial District, Oklahoma County, State of Oklahoma, do upon my official oath, further give the said Court to know and be informed that the offense of Unlawful Distribution of a Controlled Dangerous Substance, Heroin, as charged in the within Information was committed by the defendant, Flynn Noye Hicks named therein, after he had been convicted of the following crime punishable by imprisonment in the State Penitentiary: BURGLARY IN THE SECOND DEGREE on the 4th day of June 1970 in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-70-1250.

ASSAULT AND BATTERY WITH A DANGEROUS WEAPON WITH INTENT TO DO BODILY INJURY on the 21st day of October, 1975, in the District Court of Oklahoma County, State of Oklahoma, the same being District Court Case Number CRF-75-2198.

You have by your verdict found this defendant guilty of Unlawful Distribution of a Controlled Dangerous Substance. It is now your duty to determine, from the evidence, under the instructions, and beyond a reasonable

doubt, if this defendant has previously been convicted of a felony. That is, you must now determine whether this defendant was convicted of any or all of those crimes alleged by the State in the second sheet of the Information, all as set out above.

No. 2

To this second portion of the charge the defendant Flynn Noye Hicks has entered a plea of not guilty, which casts on the State the burden of proving the material allegations of the second portion of the Information to your satisfaction beyond a reasonable doubt before you would be justified in returning a verdict finding that the defendant has previously been convicted of a felony.

This second portion of the Information is simply the charge upon which the defendant is placed upon trial on this issue and sets forth in a formal way the offense of which the defendant is accused. It is in and of itself no evidence of the defendant's guilt of any former conviction, and you should not allow your selves to be influenced against the defendant by reason of the filing of this second sheet of the Information.

The defendant is presumed to be innocent of the charge made against him in the second portion of the Information and innocent of each and every material element of said charge, and this presumption of innocence continues until such time as his guilt of this second charge is shown to your satisfaction beyond a reasonable doubt. If, upon a consideration of all the evidence, facts and circumstances in the case you entertain a reasonable doubt of the guilt of the defendant of the charge made against him in the second portion of the Information, you must give him the benefit of that doubt and return a verdict of not guilty of that second portion of the charge alleging the commission of a crime "after former conviction of a felony".

No. 3

You have by your verdict found the defendant Dianne Elizabeth Jones guilty of the crime of Unlawful Distribution of a Controlled Dangerous Substance. It is

now your duty to assess this defendant's punishment for the commission of this offense.

This defendant is not charged with convictions of any previous felonies. In such case the laws of the State of Oklahoma provide that the punishment for Unlawful Distribution of a Controlled Dangerous Substance is imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00).

No. 4

You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.

Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.

Should you find that this defendant had previously been convicted of only one felony offense at the time he committed the present offense, then you shall assess his punishment at imprisonment in the State Penitentiary for a term not less than ten (10) years.

Should you find that this defendant has not been previously convicted of any felony offenses, then you shall assess his punishment at imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00).

No. 5

All the previous instructions given you in the first part of this trial apply where applicable and must be considered together with these additional instructions. Together they contain all the law of any kind and the rules you must follow in deciding this case. You must consider them together and not just a part of them.

You are reminded that you shall not allow sympathy, sentiment or prejudice to affect your deliberations, but you shall do your duty as jurors impartially and faithfully as you swore you would do. You must not use any kind of chance in reaching your verdict concerning punishment but rest it upon the opinion of each juror who agrees with it.

You have already elected a foreman, who alone will sign your verdict. Your verdict must be unanimous. Numerous forms of verdicts will be given you. Only one of these forms is applicable to the defendant Dianne Elizabeth Jones. You should properly fill out that verdict form within the provisions of these instructions. The remainder of the verdict forms apply to the defendant Flynn Noye Hicks. From them you should choose only the one to be used by you in expressing your decision and properly fill it out within the provisions of these instructions. When you have reached a verdict all of you in a body must return it in open court.

The law provides that you shall now listen to and consider the further arguments of the lawyers.

Date April 14, 1977

/s/ [Illegible]
District Judge

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

FLYNN NOYE HICKS, and DIANNE ELIZABETH JONES
aka DIANNE HOLMES, DEFENDANTS

TRANSCRIPT OF THE SECOND STAGE TRIAL AGAINST PETITIONER ON THE AFTER PRIOR FELONY CHARGE PURSUANT TO 21 O.S. SUPP. 1976, § 51(B)
(pp. 158-186 of the Transcript)

[158] (THEREUPON, the following transpired in chambers on the 14th day of April, 1977)

THE COURT: Let the record show that we are in chamber. Do you gentlemen have something that you want to tell me.

MR. PEARSON: Yes, sir.

MR. GEB: We have a stipulation.

MR. PEARSON: The stipulation on the part of the Defendant Hicks is that the two convictions for Burglary in the Second Degree and Assault and Battery with a Dangerous Weapon with Intent to do Bodily Injury listed on page 2 of the Information are final judgments and not subject to appeal, that the certified copies the District Attorney will introduce are true and correct copies of the originals on file with the Court Clerk of the District Court of Oklahoma County, and that these two convictions arose out of separate transactions.

MR. GEB: And that they were represented by counsel at the time.

MR. PEARSON: And that he was represented by counsel.

THE COURT: I don't know how you can stipulate if you don't stipulate that your man is this man.

MR. PEARSON: We can make that stipulation, because on the face of the Judgment and Sentences, it does have the name of the attorneys in each case, Joe Black and Archibald [159] Hill.

MR. PAGE: Jim, what Judge is talking about is—well, I better not say.

MR. PEARSON: We make the stipulation that they arose out of separate transactions, because they are five years apart, the Judgment and Sentences.

MR. GEB: Wouldn't it save a lot of time to ask Joe Black? If there is any dispute that he was convicted of this, Joe Black can tell you this.

THE COURT: Why don't you stipulate that these are the official Judgment and Sentences from the records of the Court Clerk and they purport—appear to be final Judgment and Sentences, and that the Defendant was represented by counsel at the time, well—

You are not agreeing that that Defendant and your man are one and the same?

MR. PEARSON: Yes.

THE COURT: The State is required to prove that?

MR. PEARSON: That's what I thought I said.

THE COURT: I don't think that you can stipulate to that and say, but we don't say that this defendant is the man.

MR. PEARSON: No, I'm not saying that.

THE COURT: All you have stipulated to is that we don't have to call the Court Clerk over and so forth to [160] show the authenticity of these things.

MR. PEARSON: Yes.

THE COURT: All right. We have got it and I'll tell the jury that.

(THEREUPON, discussion was had off the record)

THE COURT: Let the record show that we are in chambers and Mr. Pearson has stated that he has no objection to the Court's proposed Instructions.

Do you, Mr. Page?

MR. PAGE: No, sir.

THE COURT: Does the State?

MR. GEB: State has no objections.

THE COURT: All right. Let me know immediately when your witnesses get here.

MR. GEB: Yes, sir.

(THEREUPON, chamber hearing adjourned)

[161] (THEREUPON, the following transpired at the bench out of the hearing of the jury)

MR. PAGE: Your Honor, I visited with my client and she says that she wants to file a Motion to Vacate this guilty verdict.

She has researched some law on her own and she wants to do this prior to the time of sentencing. And I informed her if she felt like that she did not get a fair trial, she could appeal this case and have all of the errors that she feels like were committed could be reviewed by the Court of Criminal Appeals.

THE COURT: Tell her that I will do that on the Motion for New Trial, that I'll hear anything she wants to give me at the time of sentencing.

MR. PAGE: That was in substance what she wants.

THE COURT: All right.

(THEREUPON, the following transpired in open Court within the hearing of the jury)

THE COURT: Members of the Jury, the final stage of this trial is on the punishment—is devoted to assessing the punishment.

In that connection, the State will first read to you the second page of the Information that applies to the previous felony convictions of one of the Defendants. [162] And then, the State will make its statement of what it will prove here in the second stage. Afterwards, you will hear the Defendants' statements if they care to make opening statements.

The State will then prove certain things to you which are pertinent to punishment. After that, I'll read the Instructions setting out the punishment, and you'll hear the closing arguments and then you will deliberate this second stage of the trial.

The State will now read to you the Information's second sheet and give its opening statement.

MR. GEB: Ladies and Gentlemen of the Jury, I read to you the Information, the second part of this case.

(THEREFORE, Mr. Geb read the Information to the jury)

MR. GEB: To the Information on the second sheet, the Defendant enters his plea of not guilty, which puts each and every material allegation set forth in the Information in issue in this case.

The State will introduce two Judgment and Sentences in this case. We will introduce and show that on the 4th day of June, 1970, that the Defendant Flynn Noye Hicks was convicted of Burglary in the Second Degree.

And we will have the officer in connection with that, who will testify and tell you that this is one and the same person.

[163] And we will have Mr. Dan Gray to testify to the fact that this was filed of record and is an official record of the Clerk's Office of the District Court of Oklahoma County, and that he had an attorney, that the case had not been appealed from, and that it's a final judgment.

We will also introduce and show by a Judgment and Sentence that on the 21st day of October, 1975, Flynn Hicks, being represented by Joe L. Black at that time, was convicted of Assault with a Dangerous Weapon with Intent to do Bodily Harm After a Former Conviction of a Felony.

We will show the Court and the jury that this is a final judgment, that it has not been appealed from, that he was represented by counsel.

And when we have shown you and introduced these exhibits, and introduced the officers that will testify in this case that he is one and the same person, the State will rest upon the submission of that evidence.

THE COURT: Mr. Page, do you care to make a statement?

MR. PAGE: No, Your Honor, not at this time. We will reserve ours.

THE COURT: Mr. Pearson.

MR. PEARSON: We will reserve ours, Your Honor.

THE COURT: All right. Call the first witness for the State.

[164] MR. GEB: At this time, I wonder if we might possibly have some stipulation.

(THEREUPON, bench conference was had)

(State's Exhibit Nos. 5 and 6 were marked for the purpose of identification)

MR. GEB: At this time, the State would like to introduce State's No. 5 and State's No. 6.

MR. PEARSON: No objection.

THE COURT: I'll tell the jury about the stipulation.

MR. GEB: Yes, sir.

THE COURT: State's Exhibit Nos. 5 and 6, are Judgment and Sentences on pleas of guilty. One is June 4, 1970, where it reflects this Defendant—a Defendant, Flynn Noye Hicks, was convicted of Burglary in the Second Degree.

You'll read it more fully and see what the sentence imposed was.

And the other one is a Judgment and Sentence on a plea of guilty on October 21, 1975, a Flynn Noye Hicks, entered a pleas of guilty to Assault with a Dangerous Weapon with Intent to do Bodily Harm.

The parties—the lawyers, Mr. Pearson and the State have—Mr. Pearson has agreed with the State that these are official records of the Court [165] Clerk of Oklahoma County, that they do reflect convictions of felony offenses on those certain dates, that these convictions were had, at the time that the Defendant was represented by counsel, and that they are final convictions.

The Defendant does not stipulate that this Defendant and the Defendant Hicks are one and the same person.

The State will have to prove that. With that stipulation, the State will call its witness.

MR. GEB: Mr. Curlee.

(State's Exhibit Nos. 5 and 6 were offered and admitted into evidence)

[166] THEREUPON

W. L. CURLEE

the witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GEB:

Q State your name?
A W. L. Curlee.
Q What is your business, Mr. Curlee?
A I am a detective with the Oklahoma City Police Department.
THE COURT: Pull the microphone down and speak loudly into it.

BY MR. GEB: (Continuing)

Q And how long have you been with the police department?
A Twenty years.
Q Officer Curlee, I'm handing you State's Exhibit No. 5, pertaining to the Judgment and Sentence of guilty, State of Oklahoma versus Flynn N. Hicks, case number CRF-75-2198—no, 75—I mean, pardon me, 70-1250, are you acquainted with that Judgment and Sentence?
A Yes, sir.
Q Are you acquainted with Flynn N. Hicks that is named in that Judgment and Sentence?
[167] A Yes, sir, I am. I handled this case back in 1970.
Q Yes, sir.
Do you see the man, Flynn N. Hicks, in the Courtroom today?
A Yes, sir.
Q Will you point him out and tell the jury where he is sitting?
A Sitting at the table there between the two men in the suits.

Q All right. And is he one and the same person that received that Judgment and Sentence against him on that date in that case?
A Yes, sir.
MR. GEB: All right.
MR. PEARSON: No questions, Your Honor.
MR. GEB: May he be excused?
THE COURT: You just asked him about one.
MR. GEB: Sir?
THE COURT: Didn't you just ask him about one?
MR. GEB: Yes, sir. I have another witness on the other.
THE COURT: All right. You may be excused.

(Witness excused)

MR. GEB: Would you send the other officer in, please.

[168] THEREUPON

EDDIE HOCKLETUBBE

the witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GEB:

Q State your name?
A Eddie Hockletubbe.
Q And where—
MR. PEARSON: I'm sorry. May we approach the bench, Your Honor.
THE COURT: If you need to, yes.

(THEREUPON, the following transpired at the bench out of the hearing of the jury)

MR. PEARSON: Comes know the Defendant and objects to this witness testifying for the reason his name is not—has not been endorsed on the information.
MR. GEB: His name is on it.

THE COURT: It's not on here. Do you move to introduce or endorse it?

MR. GEB: Yes, sir.

THE COURT: I will permit him to endorse him. And I don't think that the Defendant is prejudiced by it.

(THEREUPON, the following transpired in open Court within the hearing of the jury)

[169] BY MR. GEB: (Continuing)

Q Officer, is that Hockletubbe?

A Hockletubbe.

Q Hockletubbe. I hand you what has been marked and identified as State's Exhibit No. 6 in case number CRF-75-2198—

THE COURT: First, did you ask him who he is employed with?

MR. GEB: I'm sorry.

BY MR. GEB: (Continuing)

Q Where are you employed?

A Police officer of the Oklahoma City Police Department.

Q How long have you been employed there?

A A little over eight years.

Q Now, were you employed in the year 1975?

A I was.

Q I hand you State's Exhibit No. 6, will you tell us the name of the Defendant there?

A Mr. Flynn Hicks.

Q Are you acquainted with that case?

A (No response)

Q That numbered case, CRF —

A Yes, I am.

Q And do you see Mr. Hicks in the Courtroom here [170] today?

A Yes, I do.

Q Would you point him out to the jury, and tell them where he is sitting, please?

A Mr. Hicks is the black man with the mustache and the multi-colored dark shirt, sitting over at there.

Q Is he one and the same person that was convicted—is he the same person that was convicted of State's Exhibit No. 6?

A Yes, he was.

Q And did you handle that case?

A Yes.

MR. GEB: All right. That's all.

THE COURT: Mr. Pearson?

MR. PEARSON: No questions, Your Honor.

THE COURT: All right. That's all. Thank you.

MR. GEB: May he be excused, Your Honor.

THE COURT: Yes.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: Is there any other witnesses?

MR. GEB: That's all.

THE COURT: Do you rest?

MR. GEB: We rest.

THE COURT: The Defendant Hicks, the State has [171] rested.

MR. PEARSON: The Defendant Hicks rests, Your Honor.

THE COURT: Mr. Page.

MR. PAGE: The Defendant Jones rests, Your Honor.

THE COURT: All right. All parties have rested. I'll read to you now, Members of the Jury, the Instructions that apply in this phase.

(THEREUPON, the Court read the Instructions on phase two of the trial to the jury)

THE COURT: The State has the first argument, you'll now listen to Mr. Geb.

MR. GEB: Thank you, Your Honor.

Ladies and Gentlemen of the Jury, you've heard the stipulation that His Honor announced, that these two exhibits were exhibits from the Court Clerk's office. They were the official records pertaining to Flynn Noye Hicks.

We did put on the two officers that arrested and had the investigation and so forth of Flynn Noye Hicks in

the other two cases, Burglary and Assault with a Deadly Weapon.

So we feel that the State has proved absolutely and beyond any doubt that this is the one and the same person. The officers both said that he was the same person that was [172] convicted on these two charges. And that is the only evidence, Ladies and Gentlemen, that came to you this morning.

Now, the Legislature in its wisdom has felt apparently that this was a very serious crime, and is very more serious when after a person has been convicted of two felonies. Two felonies.

I don't think that the law means anything to Mr. Hicks, after having two convictions and then a third conviction here yesterday, a third felony conviction.

And the only way, Ladies and Gentlemen, that we can stop this sale and eliminate the pushers of heroin in this community is to come back with a substantial verdict, and a verdict that the evidence justifies.

It's mandatory the Legislature said, as Your Honor read to you in the Instructions. And the Judge sets the law out, I don't and the other attorneys don't.

It is mandatory that they get forty years if you find that he has been convicted of two felonies before. And you've heard the evidence that he had been.

You heard the officers testify to that that he was one and the same person. You heard the stipulation that this was the official record.

Now as to Dianne Elizabeth Jones, her punishment goes from five years to twenty years. I would ask the jury to consider—seriously consider a term of fifteen years in [173] her case, because Heroin as you know is a very serious thing. The possession of heroin isn't as bad, but when you start pushing it or selling it, like the evidence —like you found from the evidence that she was, then it becomes a serious thing.

I don't know how many people have been convicted of things like this, and how many people suffer from the sale of heroin in the community—Oklahoma community, Oklahoma County community.

And I ask you as a deterrent and taking strong stand, a stand that says that the pushers are not welcome here in Oklahoma County; and when we get them up to the Courtroom, we are going to give them a substantial verdict.

And the State would be interested in hoping that you take a strong stand on the pusher and find them guilty. And take a strong stand and return a verdict of fifteen years as punishment for her, and a term of forty years as set out in the statutes as mandatory by the State Legislature.

Thank you, Ladies and Gentlemen.

THE COURT: Mr. Pearson.

MR. PEARSON: May it please the Court, Ladies and Gentlemen of the Jury, about the last thing that I said to you yesterday was to ask you when you went into the jury room, Do I believe Eugene Major beyond a reasonable doubt. [174] If you do, bring back a verdict of guilty.

That was done. We have to accept that as the law, because you are the jury, the judges of the facts, and we have to accept that.

Now, it's time to assess the punishment. And as the Instructions said, you will receive many forms of verdicts that apply to my client, Flynn Noye Hicks.

The one verdict form that I would like to talk to you about is a verdict form where you will be able to assess five to twenty years when you fill in the punishment, and a fine up to $20,000.

As the Judge told you, I'm a Public Defender. Mr. Hicks has no money. And a fine in this case would be totally inappropriate because there is no way in the world that he could even begin to pay a fine.

And now, all through this trial, Mr. Page and I have asked you to let your reason dominate, not your prejudices, not your—not an attempt to inflame you to act as a lynch mob psychology, Let's do it now and think about it tomorrow.

The prosecutor in his closing arguments tried to say that yesterday when we didn't have a chance to response to it.

When the District Attorney says mandatory forty years, that is not quite true. If you should find from your [175] —by your verdict certain things, then the law says that you've got to do it.

But you don't have to find those things. You are the judges of the facts. For this brief period of time, each of you symbolically put on black robes and you have your job. Judge Owens is the judge of the law, and you are the judges of the facts.

If you believe that forty years for one sale of heroin is so excessive, so unfair, then sign the verdict form which says, five to twenty years and zero dollars.

There's a little space to put the zero in there, for the amount of fine, come back in here and tell us in open Court that that is your verdict, that you have decided these facts and that's the end of this case.

Ladies and Gentlemen, that's why we are asking for your reason, your logic. What's fair in this case. We're not trying to ask for sympathy. We don't want any sympathy. We want your justice.

The District Attorney wants to inflame. He almost reminds me in his closing argument of the stereotype western. Everybody trying to beat down the jail.

And the Marshal trying to hold them off and saying, Let's have a little bit of reason. Let's have a little bit of law here.

Except Mr. Geb is trying to tell you, the same [176] as the Marshal turning around and saying, Yeah, come on, boys. I'll help you do it. I'll think about it tomorrow.

That's the kind of blind passion that he is trying to stir up in you. We're asking for reason? We're asking for you to consider the verdict forms, on that verdict form, five to twenty years.

You can do it. You decide the facts. If you want a verdict form on five to twenty years, sign that form and come back and let Mr. Hicks go to prison.

Thank you very much, Ladies and Gentlemen.

THE COURT: Mr. Page.

MR. PAGE: Thank you, Your Honor. Ladies and Gentlemen, I guess, this is probably the most difficult part

for the defense attory after you've found his client guilty, and then asking you to assess the proper punishment in the case. And I have found it most difficult, too.

We lawyers in our pleadings pray for and pled for certain things. And we are asking you today as far as Dianne Jones goes; because the Court has instructed you that the range of punishment in her case is for five—not less than five to twenty years.

You have a range of five to twenty years plus a $20,000 fine. She has not by this filing been convicted previously with any felonies otherwise it would be more.

So her range of punishment is separate from Mr. [177] Hicks.

And now, Mr. Geb has asked you to give this young lady fifteen years in the State Penitentiary. Granted whether it be one sale or several sales of heroin, it's not a good thing for the public in this county or any place; however, consider during your deliberations the fact that it was only one sale.

And as I've pointed this out to you yesterday, had this individual or these individuals made additional sales, I don't believe they would have left them on the streets of Oklahoma City from October 5 to December 15 before they brought them in.

Their activities, Mr. Geb leads you to believe that these are probably big time pushers. We have one sale with each individual that you have found them guilty of.

There is no indication that—in this trial that these are big time pushers. Mr. Geb will say, Well, okay, let's get all of the pushers off.

Fine, I agree with him, but at the same time, don't let him lead you to believe that the testimony from this witness stand that these are big time pushers. There is no evidence to that whatsoever.

Ladies and Gentlemen, I feel in my opinion based upon the evidence in this case which you found my client guilty, that a punishment of five years would be rather [178] severe for this client.

Mr. Geb mentioned in his voir dire of you, he was selecting the jury, that one of these Defendants would have maybe children involved.

I don't know about Mr. Hicks. My client has children—three children. Her husband is sitting right there in the green and black shirt.

MR. GEB: We are going to object—

THE COURT: Sustained.

MR. GEB: —Your Honor, because it's not a part of the evidence in this case.

THE COURT: Sustained.

MR. PAGE: And we would ask that the punishment—and I don't know what inflames the District Attorney to ask for fifteen years. I was a District Attorney, myself, an Assistant, some years back with Mr. Harris.

But to ask for fifteen years in this type of case, from the evidence that you've heard, that's what you want to do based upon his prayer for that, why, fine.

But you consider the evidence in this case based upon what you have heard, what you have considered, come back with a five year penalty which is the minimum amount of time.

And I think that you would feel that I was negligent in my duty if I didn't ask you to give her the [179] minimum punishment. I'm certain no competent defense counsel would ask you to give her twenty years.

So, Ladies and Gentlemen, for me and my client, we ask that you assess the punishment at the minimum of five years.

Thank you.

THE COURT: Mr. Geb.

MR. GEB: Ladies and Gentlemen, before I do close, I do want to thank you for listening and being so attentive in both of these periods.

It's very important to the attorneys on both sides to have the case well considered, and you have. You have considered it and listened to it very attentively.

Mr. Pearson really shocked me when he said, Well, you can go around and give him five—you can give him five years to twenty.

And Mr. Pearson, I thought heard the Court's Instructions. The Court's Instructions were that under number four. You may like to read this.

"Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the [180] "State Penitentiary."

Forty years. I don't see how he can tell you to ignore the two previous felony convictions. You have heard the testimony. He even stipulated.

He even agreed with me that these were the official records. And now, he comes in and wants you to ignore the official records, ignore the—all of the evidence presented in this case.

He tells you, Well, why don't you just slip by that, kind of cast your eyes the other way. Ladies and Gentlemen, you as jurors will follow the law.

You all said you would as I know you will in this case. The law says that two previous convictions, then it shall be forty years.

And I—the State doesn't feel that there is really any alternative on it; because the only evidence that you've heard is two previous convictions, and that's unrefuted. He stipulated to that.

And the officers said this was the same man that was involved in it.

Now as to Dianne, I could have asked for twenty years very naturally. I don't know how many lives have been destroyed by these people.

I don't know how much—what their activities were; but we were able to catch them on this particular case. [181] And that doesn't—well, you can see yourself what —we know nothing about anything else concerning this except that we were lucky enough to catch them.

They might have made that sale and we couldn't catch them until the next day, then we would catch them on another sale.

Ladies and Gentlemen, anything that is sold as heroin, the worst drug on the market, the worst drug. And you will be doing a service to your community, and a service

to the children and adults in this community, by coming back with a strong verdict.

A strong verdict that says, We're going to ask for a substantial punishment on dope pushers. We are against the dope pushers destroying our children and our families and our community and destroying the morale of our whole system.

If you will come back with that, and come back with a strong verdict, you will always be proud that you sat on this jury and that you did your part in stopping this tide of sale of heroin. The worst drug that ever hit the Oklahoma City area.

Thank you, Ladies and Gentlemen. Thank you, again, for listening.

THE COURT: You'll now retire again and deliberate this second stage of the trial and return us a verdict.

[182] You'll take with you the Instructions, the first and second set of Instructions. You'll take the two exhibits that have been admitted into evidence. Look them over.

There are as I have said in my Instructions, four possible verdict forms. One of these applies only to the Defendant Dianne Elizabeth Jones.

The other three are applicable to the Defendant Hicks. In other words, you will do as you did before, you will endorse one verdict for each of them.

Choose the one that you think is the proper one as to Hicks, and return all of them to us. Your foreman should have at that time signed two of the verdict forms.

Let us know—press the buzzer when you have a verdict or if you necessarily—you think you need to report something short of a verdict.

Please read your Instructions. As I have stated in the first stage, they contain everything that I know about, that you should have in this case.

I think if you will read them, if you think you have a question, I think if you will reread them, the answer is there.

It was before and it is now. Let us know when you have a verdict.

[183] (THEREUPON, the jury retired to deliberate their verdict)

(THEREUPON, the jury returned to the Courtroom)

THE COURT: Thank you. You may be seated.

Mr. Foremen, have you reached a verdict?

THE FOREMAN: Yes, we have, sir.

THE COURT: Would you please hand them to the Bailiff.

(THEREUPON, the foreman handed the documents to the Bailiff)

THE COURT: The Clerk will read them.

(THEREUPON, the Clerk read the verdicts, after which the Court inquired of the jury individually if this is their verdict to which each answered in the affirmative)

THE COURT: These records will be received and properly filed. I'll set the date of sentencing one week from today, April 21, at nine a.m.

(THEREUPON, the following transpired at the bench out of the hearing of the jury)

MR. PEARSON: Your Honor, Mr. Hicks wants permission to talk to you.

THE COURT: Let's excuse the jury first.

MR. PEARSON: All right.

(THEREUPON, the following transpired in open Court within the hearing of the jury)

THE COURT: Members of the Jury, that concludes [184] service in this case, and I want to express our appreciation to you for it.

Criminal matters are difficult matters for juries to sit and decide. I'm sure that it's a very awesome responsibility to determine the punishment—the guilty or in-

nocence of one's peers and even more awesome to fix the punishment.

(THEREUPON, the Court had further discussion with the jury, after which the jury was excused and the following transpired in open Court after all jurors left the Courtroom)

THE COURT: Mr. Hicks, come up, please.

(THEREUPON, Defendant Hicks and counsel approached the bench)

THE COURT: Your lawyer says that you have something that you want to say to me. The proper time to do that—if it's some legal matter concerning these verdicts, the proper time to do it is at the time of the sentencing which is one week from today.

At which time, I will hear your lawyer, he will file a Motion for New Trial, and I'll hear you.

DEFENDANT HICKS: Judge.

THE COURT: Yes.

DEFENDANT HICKS: Your Honor, I just wanted the record to show that I would like a transcript of my preliminary hearing and of my District trial hearing and all of the documents pertaining to my case.

[185] Judge, I want to appeal. I'm innocent.

THE COURT: That's what I'm saying—what I was just saying. At that time if the Motion for New Trial is overruled, then you can show me that you are not able to pay for those things, I'll order a transcript of the trial proceedings.

And I'll appoint a lawyer to represent you on appeal. That comes later. This Judgment and Sentence, the sentencing comes usually later, a week or so later after the trial.

But I'll hear you at that time on any other matters that you care to be heard on. And that applies to—Mr. Page, come up and bring your client up also.

(THEREUPON, Defendant Jones and counsel approach the bench)

THE COURT: That applies to you also, Mrs. Jones. You wanted to say something earlier, and I told your lawyer to tell you that I would hear that sort of thing at the time of sentencing which has been set for one week from today, the 21st.

DEFENDANT JONES: All right.

THE COURT: I'll hear your lawyer's Motion for New Trial and anything that you wish to tell me at that time. I'll also hear you.

DEFENDANT JONES: Okay.

THE COURT: Meanwhile, do you have anything [186] further?

DEFENDANT HICKS: No, sir, I don't.

THE COURT: He will be remanded to the custody of the sheriff.

Mrs. Jones, you will remain on that bond. You must be here without fail April 21, one week from today, at nine o'clock a.m.

DEFENDANT JONES: Yes, sir.

THE COURT: Is that all, gentlemen?

MR. PEARSON: Yes, Your Honor.

MR. PAGE: Yes, sir.

MR. GEB: Yes.

(THEREUPON, Court adjourned)

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

FLYNN NOYE HICKS, DEFENDANT

* * * *

HEARING ON JUDGMENT AND SENTENCE

HEARD ON THE 21st day of April, 1977

PRESIDING: THE HONORABLE CHARLES L. OWENS
District Judge

* * * *

[188] (THEREUPON, the following transpired in open Court on the 21st day of April, 1977)

THE COURT: CRF-76-4597, State of Oklahoma versus Dianne Elizabeth Jones and Flynn Noye Hicks.

I'll take the Hicks matter first since I have some other companion matters in the Jones case.

Come up here, Mr. Hicks.

(THEREUPON, Defendant Hicks and his counsel approached the bench)

EXAMINATION BY THE COURT:

Q You are Flynn Noye Hicks?
A Yes, sir.
Q How old are you?
A Twenty-eight.
Q Mr. Pearson, is your lawyer, is that right?
A Yes, sir.

THE COURT: Do you believe your client to be competent to understand the nature of these proceedings, Mr. Pearson?

MR. PEARSON: Yes, sir, Your Honor.

THE COURT: The Court so finds.

BY THE COURT: (Continuing)

Q You have been convicted, Mr. Hicks, of Unlawful Distribution of a Controlled Dangerous Substance by a jury, and the jury assessed your punishment at forty years [189] imprisonment, do you understand that?

A Yes, sir.

Q You have a right to file a Motion for New Trial, have you filed that motion?

MR. PEARSON: Your Honor, we file it in open Court at this time.

THE COURT: All right. I'll hear you on your motion.

MR. PEARSON: Thank you, Your Honor.

The Defendant Flynn Hicks moves for a new trial for all of the grounds listed in the Motion for New Trial; but in particular, we would urge the first three errors in the Motion for New Trial.

As the Court will remember, the key in this case was the credibility of the two witnesses, Atwood and Major.

And we believe an error of the Court in prohibiting the Defendant from impeaching the testimony of the witness, Eugene Major, by the use of prior inconsistencies in statements through the testimony of Brent Barnes.

We believe that in any criminal prosecution, the Defendant has the right to impeach the credibility of a witness by calling another witness who would testify that the prior witness has made an inconsistent [190] statement.

And the inconsistent statement that we sought to have elicited was crucial—was the crucial issue in this case, whether the witness Major was telling the truth about whether he had committed perjury or not in the preliminary hearing, and dealing with the incident described herein.

We believe that the denial of our right to impeach the witness Major by the testimony of Barnes was prejudicial to this Defendant's defense.

And the second error is that we were prohibited from reading from the preliminary hearing transcript to the witness Barnes to verify the accuracy of the preliminary hearing, the transcript.

We believe under the laws of Oklahoma that for that purpose there is no requirement that the transcript be on file.

And that the prejudice that resulted was in essence the same prejudice that resulted from errors in number one.

That we were deprived of putting forth before the jury the inaccuracies of Major's testimony on crucial parts and what we believe to be outright lies.

The third error is that the Court erred in permitting the State to recall witnesses, Major and [191] Atwood, after the rule had been invoked and after they had admitted conferences.

And it was obvious that they said that they did testify—that they had talked about the case during the recesses.

THE COURT: What is wrong with that?

MR. PEARSON: Well, after the rule had been invoked and then recalling them back, Your Honor. That's the whole purpose of the rule.

THE COURT: They weren't in here during the testimony of each other.

MR. PEARSON: That's true, Your Honor, but they went back to discuss this. They admitted discussing their testimony and then coming back in.

And we believe that to be a prejudicial error.

And for all of the other errors, we have alleged four through nine, we believe that this Defendant is entitled to a new trial in this matter.

THE COURT: Mr. Geb.

MR. GEB: Of course, Your Honor, the Court thoroughly went into this transcript matter, the reporter —we had what looked like a transcript that was unsigned and unstamped.

The original was not available, never been filed. The reporter didn't even have his notes available. We [192] asked him about his notes, and he didn't even have his notes to refer to.

And to put him on the stand out of the clear blue sky without his notes, without the original, or without anything else, we think that certainly is not prejudicial in not permitting him to testify.

And the Court so ruled at that time. And we felt that the Court was right on that.

And he did—the Defendant's attorney did interrogate from what purported to be—which I don't know whether it was or not—a transcript.

It was some sheets of paper with some typing on it, certainly not a transcript. And he did thoroughly go into it with Mr. Major, the witness.

I don't see how he could be prejudiced in any way. And Major and Atwood being recalled, Your Honor. They didn't say that they were talking about their testimony.

And as I remember the record, and at that, they were not in the Courtroom; so we feel that these motions, the Court considered them thoroughly at the time except the third one—and this is something new.

But the first and second ones, the Court overruled. And as I recall the Defendant didn't even object any way to the third one at the time. Maybe he [193] did, but I don't recall it.

And all of the rest of the ones are just frivolous apparently, becaue he hasn't argued any of them. And we would ask that the Court to overrule the motion.

MR. PEARSON: Your Honor, as to the first alleged error, the Defendant did make an offer of proof that Brent Barnes could testify from his memory without notes as to the prior oral inconsistent statements just as any witness would do.

And for that reason we believe that if nothing else, error number one should result in a motion—should result in a new trial.

THE COURT: All right. Is there anything further?

MR. PEARSON: No, Your Honor.

THE COURT: All right. Do you know of any legal cause why judgment should not be pronounced other than what you have told me about in your Motion for New Trial?

MR. PEARSON: No, Your Honor.

THE COURT: All right. And Mr. Hicks, do you have anything to say?

DEFENDANT HICKS: Yeah. I don't want to make anybody mad, but it's just a question that I just wanted [194] to know, you know, the transcript that they wouldn't let—you know, to be admitted into evidence.

It was the only transcript that was here in Court that day, and Mr. District Attorney used it to let Major refresh his memory from it.

And you know, he said it wasn't certified, but he refreshed his memory from it. And it must have been what he said in the preliminary—you know, the evidence, the inconsistent statements.

And I was there, and he refused all of it. He said that he didn't say any of that, and I was there and I heard him say it, Your Honor.

Your Honor, I'm just not—I'm just—I didn't do nothing that he said. Your Honor, I'm innocent.

THE COURT: Of course, that's what the jury is all about. I don't rule on whether you are guilty or not guilty, do you understand that?

I rule on questions of law. It is for the attorney who defends you about the transcript. There are some legal things that you couldn't be expected to know about that.

DEFENDANT HICKS: Yes, sir.

THE COURT: Do you have anything further?

DEFENDANT HICKS: I'm innocent. I didn't sell that man any dope. I didn't even see no dope, Judge.

[195] THE COURT: All right. If there is nothing further, the Motion for New Trial is overruled with exceptions.

It will be the sentence of the Court in accordance with the jury verdict that the Defendant is sentenced to forty years imprisonment.

The appeal bond is set at $25,000.

BY THE COURT: (Continuing)

Q You have a right, you understand, Mr. Hicks, to appeal this to the Court of Criminal Appeals?

A Yes, sir.

Q To have an attorney appointed for such an appeal, if you are unable to hire an attorney. And to have a free transcript of the trial proceedings if you are not able to pay for that?

A Yes, sir.

Q And in order to appeal, you would have to give your Notice of Intention to Appeal within ten days—in writing within ten days from today.

Do you wish to appeal this Judgment and Sentence?

A Yes, sir, I would like to appeal.

Q Are you able to hire an attorney to take your appeal?

A No, I'm not, Your Honor.

THE COURT: Does the State know of any reason [196] or believe that he is able to hire an attorney?

MR. GEB: We would like to ask him if he has any property of any kind.

THE COURT: You may ask him that.

MR. GEB: Do you have an automobile?

DEFENDANT HICKS: No, I sure don't. I don't have any money. I wasn't even able to make a $5,000 bond.

MR. GEB: You don't have any furniture?

DEFENDANT HICKS: No, I don't.

MR. GEB: Or property of any kind?

DEFENDANT HICKS: No, I don't.

MR. GEB: Under those circumstances, Your Honor, we have no objections to him having a Public Defender.

THE COURT: I will appoint—The Court appoints the Public Defender to represent you on your appeal, and I order that the transcript of the trial proceedings be provided at public expense.

DEFENDANT HICKS: Well, Your Honor, could I get my transcript and all of the things pertaining to my case?

THE COURT: Speak up so we can hear you.

DEFENDANT HICKS: Could I get a transcript of my hearings be sent to me. I would like to have them.

THE COURT: You can get together with the Public [197] Defender. He will need it first of all, to draw up his brief for the Court of Criminal Court of Appeals.

He has to brief the case and prepare a brief and file it with them. And that's done by reading the transcript, his copy.

The original will be filed, and he'll have a copy. And I would imagine that he can set that to you.

MR. PEARSON: Yes, Your Honor.

THE COURT: And once he is finished with it.

Do you have anything further to ask me or tell me?

DEFENDANT HICKS: I'm—ain't no words for this, Your Honor. I haven't got no words for this. This is a horrible hearing

THE COURT: You may be held in the county jail at least ten days if you care to or transported to the penitentiary immediately.

DEFENDANT HICKS: I'll take the ten days.

THE COURT: You would like to be held?

DEFENDANT HICKS: Yes, sir.

THE COURT: And during that time, I'm sure that your attorney will want to talk to you about the appeal.

This summary sets out what I have asked you and what you have answered and the rulings that I have made [198] today.

If it's accurate, you and your lawyer should sign it.

DEFENDANT HICKS: I want to know who's going to handle my appeal down there.

THE COURT: They have, I believe—Mr. Elliott, come up, please.

(THEREUPON, Mr. Elliott approaches the bench)

THE COURT: Mr. Hicks is inquiring about who will handle this appeal. I believe that you have an appellate division in your office now.

MR. ELLIOTT: That's correct.

THE COURT: Is that right?

MR. ELLIOTT: That's correct. It will be John Stuart, and he will be up to see him.

THE COURT: Very well. He will be held ten days, so—

MR. ELLIOTT: All right.

THE COURT: —Mr. Stuart will see him.

MR. ELLIOTT: He will do that, yes.

THE COURT: The Public Defender's office has a special division now. That's all they do is to handle appeals.

Mr. Stuart—Mr. John Stuart, Mr. Elliott tells me that he will be up to see you. Mr. Elliott is the [199] Public Defender.

MR. PEARSON: Your Honor, here is an Order of the Court overruling the Motion for New Trial, a Designation of record, and an Order for Transcript.

THE COURT: He dosen't necessarily need to sign it if he doesn't care to. The transcript of the proceedings will show what we did.

MR. PEARSON: Also, Your Honor, we file a Notice of Appeal and a Request for Transcript at Public Expense. That's all we have, Your Honor.

THE COURT: All right. If there is nothing further, the Defendant is remanded to the sheriff.

DEFENDANT HICKS: Oh, do I—I wanted to ask, do I have an option today? Do I have to let the State handle my appeal.

THE COURT: No, of course, you may hire your own attorney. That's what I was asking you before, whether you had funds to hire your own attorney.

You mean the Public Defender? Whether you have to hire them?

DEFENDANT HICKS: Yes.

THE COURT: That's who I appoint if you are unable to or don't have any money to hire your own lawyer.

If you have your own money to hire an attorney, [200] of course, then the Public Defender will withdraw and he can take over.

DEFENDANT HICKS: All right.

THE COURT: If you should find that you are able to hire an attorney, you immediately let the Public Defender know and he will withdraw from that, and tell me about it.

I'll let your attorney be listed as the attorney of record for the appeal, and he will have full—the full burden of filing that for you.

(THEREUPON, hearing adjourned)

VERDICT—Criminal

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA
sitting in and for Oklahoma County

VERDICT CRF-76-4597

THE STATE OF OKLAHOMA
OKLAHOMA COUNTY, OKLAHOMA, STATE

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the defendant Flynn Noye Hicks guilty of Unlawful Distribution of a Controlled Dangerous Substance.

/s/ Anthony W. Walker, Jr.
Foreman

VERDICT—Criminal

IN THE DISTRICT COURT OF THE SEVENTH
JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
sitting in and for Oklahoma County

VERDICT CRF-76-4597

THE STATE OF OKLAHOMA
OKLAHOMA COUNTY, OKLAHOMA, STATE

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the defendant Flynn Noye Hicks guilty of Unlawful Distribution of a Controlled Dangerous Substance, after having been previously convicted of two felony offenses and assess his punishment at imprisonment in the State Penitentiary for a term of forty (40) years.

/s/ Anthony W. Walker, Jr.
Foreman

VERDICT—Criminal

IN THE DISTRICT COURT OF THE SEVENTH
JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
sitting in and for Oklahoma County

VERDICT CRF-76-4597

THE STATE OF OKLAHOMA
OKLAHOMA COUNTY, OKLAHOMA, STATE

vs.

DIANNE ELIZABETH JONES and
FLYNN NOYE HICKS, DEFENDANT

We, the jury, empaneled and sworn in the above entitled cause, have previously found the defendant Dianne Elizabeth Jones guilty of Unlawful Distribution of a Controlled Dangerous Substance and we now assess her punishment at imprisonment for a term of 5 years and a fine of $000.00—.

/s/ Anthony W. Walker, Jr.
Foreman

THE STATE OF OKLAHOMA)
) ss.
OKLAHOMA COUNTY)

IN THE DISTRICT COURT OF THE SEVENTH
JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
Sitting in and for Oklahoma County, Oklahoma

No. CRF-76-4597

THE STATE OF OKLAHOMA, PLAINTIFF

—*vs.*—

FLYNN NOYE HICKS, DEFENDANT

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 21st day of April, 1977, the same being a judicial day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant FLYNN NOYE HICKS being personally present in open court, and being duly represented at all appearances before the court by his attorney of record JIM PEARSON, and having been legally charged with the offense of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted of the crime of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and

sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY.

It is Therefore, Ordered, Adjudged and Decreed by the Court that FLYNN NOYE HICKS is sentenced to a term of FORTY (40) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE HEROIN AFTER FORMER CONVICTION OF A FELONY; said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $64.60, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to

be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

[SEAL]

/s/ Charles L. Owens
CHARLES L. OWENS
District Judge

Attest:

DAN GRAY
DALE SMITH
Court Clerk

/s/ Betty White
Deputy Court Clerk

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

CRF-76-4597

[Filed April 21, 1977]

THE STATE OF OKLAHOMA, PLAINTIFF

—*vs.*—

FLYNN NOYE HICKS, DEFENDANT

MOTION FOR NEW TRIAL

Comes now the defendant, FLYNN NOYE HICKS, and moves this Honorable Court to vacate and set aside the verdict of the jury rendered and entered herein on the 14th day of April, 1977, and to grant this defendant a new trial herein, for the following reasons and causes which materially effect the substantial, constitutional and statutory rights of this defendant, to-wit:

1) Error of the Court in prohibiting the defendant from impeaching the testimony of witnesses Eugene Major by the use of a prior inconsistent statement through the testimony of the witness Brent Barnes.

2) Error of the Court in prohibiting the defendant from reading the preliminary hearing transcript to the witness Brent Barnes to verify the accuracy of the preliminary hearing transcript.

3) Error of the Court in permitting the State to recall the witness Major and Atwood in the State's case in chief for the reason it violated the rule which was invoked.

4) Error of the Court in overruling the defendant's demurrer to the evidence at the conclusion of all the evidence to which the defendant duly excepted.

5) Error at law occurring at trial and duly excepted to by the defendant.

6) Error of the Court in admitting, over the defendant's objections and exceptions, incompetent, irrelevant, immaterial and prejudicial evidence.

7) The verdict of guilt is not sustained by sufficient evidence and is contrary to the law.

8) Error of the Court in failing to adequately instruct upon the applicable law.

9) The Court erred in failing to protect the statutory and constitutional rights of this defendant and to give him a fair and impartial trial as guaranteed by the Constitution of the United States and the Constitution of the State of Oklahoma.

/s/ Jim Pearson
JIM PEARSON
Assistant Public Defender
Attorney for Defendant

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CRF-76-4597

[Filed April 21, 1977]

THE STATE OF OKLAHOMA, PLAINTIFF

vs.

FLYNN NOYE HICKS, DEFENDANT

ORDER OVERRULING MOTION FOR NEW TRIAL

Now on this 21st day of April, 1977, this cause of action coming duly and regularly on for hearing upon the motion for new trial filed herein by defendant, and the Plaintiff, The State of Oklahoma, appearing by the District Attorney of Oklahoma County, Oklahoma, and the defendant being present in person and by his attorney, JIM PEARSON and the Court having heard said motion and being fully advised in the premises finds that said motion should be overruled and a new trial herein denied.

IT IS THEREFORE ORDERED AND ADJUDGED THAT the Motion of the defendant for new trial be and the same is hereby overruled. To which finding and Order of the Court the defendant excepted.

And thereupon the Court passed judgment and sentence upon the defendant as is recited in the journal entry of Judgment and Sentence herein; to which Judgment and Sentence the defendant excepted.

/s/ Charles L. Owens
District Judge

Approved as to form:

/s/ Leonard Geb
Assistant District Attorney

/s/ Jim Pearson
JIM PEARSON
Attorney for Defendant

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

CRF-76-4597

[Filed April 21, 1977]

THE STATE OF OKLAHOMA, PLAINTIFF

—*vs.*—

FLYNN NOYE HICKS, DEFENDANT

NOTICE OF APPEAL AND REQUEST FOR TRIAL RECORD AT PUBLIC EXPENSE

Comes now FLYNN NOYE HICKS, defendant above, and gives notice of intention to appeal the Judgment and Sentence herein to the Court of Criminal Appeals, and requests that trial record be prepared; and in this connection alleges that he is indigent, wholly without funds, property or resources whatsoever to pay the costs of a trial record; that his friends and family and likewise without funds, property or resources whatsoever to pay such expense; and further that his attorney cannot prepare a proper trial record from memory.

WHEREFORE, defendant prays that the Court order a trial record to be prepared at public expense.

/s/ Flynn Noye Hicks
Defendant

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

FLYNN NOYE HICKS, first being sworn, states that he has read the foregoing request for trial record at public expense and that the matters therein stated are true.

/s/ Flynn Noye Hicks
Defendant

Subscribed and sworn to before me on April 21, 1977.

DAN GRAY
Court Clerk

By: /s/ Angela Morris
Deputy

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

Court of Criminal Appeals No. F-77-751
District Court Case No. CRF-76-4597

Filed Oct. 21, '77

FLYNN NOYE HICKS, APPELLANT,

vs.

THE STATE OF OKLAHOMA, APPELLEE.

PETITION IN ERROR

Comes now the above named appellant, by and through his attorney of record, and shows this Court the following:

I

Appellant was convicted upon trial by jury in the Oklahoma County District Court, Case No. CRF-76-4597, for the offense of Unlawful Distribution of a Controlled Dangerous Substance, to wit: Heroin, in violation of 63 O.S. Supp. 1976, § 2-401, and his punishment was fixed by the jury at a term of imprisonment of Forty (40) years in the State Penitentiary, and accordingly, judgment and sentence was imposed on the 21st day of April, 1977, in accordance with the jury verdict;

II

A Motion for New Trial was filed on the 21st day of April, 1977, with same being overruled on that date, at which time formal written notice of intent to appeal was filed and designation of record made;

III

The trial court fixed the appeal bond in the amount of twenty-five thousand ($25,000) dollars, and the appellant is currently incarcerated;

IV

The specificity of the following enumerated errors upon which this appeal is taken is limited by the late filing of the transcript and original record and the appeal is based on the following errors, to wit:

1. Error of the trial court in prohibiting the appellant from impeaching the testimony of witness Eugene Majors by use of a prior inconsistent statement through the testimony of the witness Brent Barnes;
2. Error of the trial court in prohibiting the appellant from reading the preliminary hearing transcript to the witness Brent Barnes to verify the accuracy of the preliminary hearing transcript;
3. Error of the trial court in permitting the State to recall witnesses Major and Atwood in the State's case in chief for the reason it violated the rule which was invoked;
4. Error of the trial court in overruling appellant's demurrer to the evidence at the conclusion of all the evidence to which appellant duly excepted;
5. Error of the court in admitting, over appellant's objections and exceptions, incompetent, irrelevant, immaterial and prejudicial evidence;
6. Errors of law occurring at trial and duly excepted to by appellant;
7. The verdict of guilty is not sustained by sufficient evidence and is contrary to law;
8. Error of the trial court in failing to adequately instruct upon the applicable law;
9. Error of the trial court in failing to protect the statutory and constitutional rights of this appellant and to give him a fair and impartial trial as guaranteed by the Constitution of the United States and the Constitution of the State of Oklahoma;

WHEREFORE, appellant prays that the judgment and sentence be reversed and the cause be remanded for a

new trial, or in the alternative for any other relief this Court deems just and appropriate.

FLYNN NOYE HICKS,
Appellant
JOHN T. ELLIOTT
Public Defender,
Oklahoma County

By: /s/ John M. Stuart
JOHN M. STUART
Assistant Public Defender
Chief, Appellate Division

Attorneys for Appellant

CERTIFICATE OF SERVICE (omitted in printing)

IN THE DISTRICT COURT OF OKLAHOMA
COUNTY, STATE OF OKLAHOMA

CRF-76-4597

Filed Apr. 21, '77

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

FLYNN NOYE HICKS, DEFENDANT.

DESIGNATION OF RECORD ON APPEAL

Comes now the defendant, and requests the Court Clerk to prepare the original record for purposes of lodging an appeal in the Court of Criminal Appeals. The appeal time is to start from a ruling made in the District Court on April 21, 1977. Said original record shall contain the following material from the District Court file:

This designation of record.
District Court Information.
Order Appointing Counsel.
Jury instructions.
Judgment and Sentence.
Motion for new trial.
Order overruling motion for new trial.
Notice of appeal and request for transcript.
Summary of facts on sentencing.

In addition to the above documents the following portions of the record are to be transcribed by the court reporter.

All trial proceedings except opening statement, closing argument and voir dire.

Hearing on Sentencing. (John T. Elliott, 4/21/77) Testimony of all witnesses.

All motion hearings.

/s/ Jim Pearson
JIM PEARSON,
Assistant Public Defender
Attorney for Defendant.

I, Shirley Casey West, court reporter for the above-styled case, do hereby acknowledge this request for transcript on this 21st day of April, 1977.

/s/ Shirley Casey West
Court Reporter

CERTIFICATE OF SERVICE (omitted in printing)

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

No. CRF 76-4597

Filed Aug. 10, '77

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

FLYNN NOYE HICKS, DEFENDANT.

SUPPLEMENTAL DESIGNATION OF RECORD

Comes now the defendant and respectfully requests the court reporter to prepare the following portions of the trial record in addition to the original designation of record as said portion was inadvertently not designated:

Opening arguments
Closing arguments

Respectfully submitted,

JOHN T. ELLIOTT,
Public Defender,
Oklahoma County

/s/ John M. Stuart
JOHN M. STUART
Assistant Public Defender
Attorneys for Defendant

ACKNOWLEDGEMENT

I, Shirley Casey West, court reporter for the above styled and numbered cause, do hereby acknowledge this request on this 10th day of August, 1977.

/s/ Shirley Casey West
Court Reporter

CERTIFICATE OF SERVICE (omitted in printing)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-77-751

Filed Mar. 8, '79

FLYNN NOYE HICKS, APPELLANT,

vs.

THE STATE OF OKLAHOMA, APPELLEE.

OPINION

BUSSEY, Judge:

Appellant, Flynn Noye Hicks, hereinafter referred to as defendant, was convicted in the District Court, Oklahoma County, Case No. CRF-76-4597, of Unlawful Distribution of a Controlled Dangerous Substance, in violation of 63 O.S.Supp. 1976, § 2-401, After Former Conviction of Felonies to wit: Burglary in the Second Degree and Assault and Battery With a Dangerous Weapon With Intent to do Bodily Harm. At the trial the State proved that Eugene Major, of the Multi-County Intelligence Agency, purchased a balloon of heroin from the defendant, and another from Dianne Jones, a codefendant on October 5, 1977.

Defendant asserts in his first assignment of error that the trial court erred in not permitting him to impeach the testimony of Agent Major by the use of a prior inconsistent statement. At the trial Major testified that prior to meeting the defendant he picked up a confidential informant. The defendant wished to call as a witness the court reporter from the preliminary examination, to testify that Major had said at that time that there was no informer. But at the trial Major also testified that he let the informer out of the car before he met the defendant, and that the informer was not present during any of the transaction.

In Oklahoma a witness may not be impeached by the use of inconsistent statements as to collateral matters. *Tarter* v. *State*, Okl.Cr., 350 P.2d 596 (1961). Since

the informant in the instant case was not present at the time Major bought the heroin, the issue of his existence was a collateral matter. Therefore the trial court's ruling was correct, and this assignment of error is without merit.

Defendant contends in his second assignment of error that the trial court erred by refusing to permit the court reporter to verify the accuracy of the transcript. We agree with the defendant's contention that a court reporter may be called to verify a transcript prepared by him. See *Lewis* v. *State*, Okl.Cr., 458 P.2d 309 (1969). We must find the error to be harmless, however, since we have found that its intended use to impeach the witness Major as to a collateral matter would have been improper.

Defendant urges in the third assignment of error that the trial court erred in invoking the rule of sequestration and then allowing the State to recall witnesses Major and Atwood. We have consistently held that it is within the discretion of the trial court to allow or exclude the testimony of a witness who has violated such rule. See *Kilgore* v. *State*, 10 Okl.Cr. 446, 137 P. 364 (1914) and *Slaughter* v. *State*, Okl.Cr., 236 P.2d 993 (1951). Absent a more definitive showing by defendant demonstrating an abuse by the trial court of its discretion in permitting the witnesses to testify, we must find this assignment of error to be without merit.

Defendant asserts in his fourth assignment of error that 21 O.S.Supp. 1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in *Thigpen* v. *State*, Okl.Cr., 571 P.2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the range of punishment authorized by the provisions of 21 O.S.Supp. 1977, § 51(A).

Defendant next contends that he did not receive a fair trial because of the improper remarks of the prosecuting attorney. We have carefully examined each of the alleged improper remarks and observe that on only one occasion did defendant object to the remarks. In that instance, the

defendant failed to request that the jury be instructed to disregard the remark. We have repeatedly held that when an objectional statement is made by the prosecution, it should be called to the attention of the court by timely objection, together with a request that the jury be instructed to disregard the improper statement and in the event that the objection is overruled, an exception should be taken to the ruling of the Court, preserved and argued in the motion for new trial. When this is not done, the defendant is deemed to have waived any objection unless the remarks are so fundamentally prejudicial that the court cannot by instructions to the jury correct such error. See *Neal* v. *State*, Okl.Cr., 506 P.2d 936 (1976) and *Kern* v. *State*, Okl.Cr., 522 P.2d 644 (1974). Finding that the remarks were not so fundamentally prejudicial that they could not have been cured by instruction to the jury, we are of the opinion that this assignment of error is without merit.

Defendant finally contends that the accumulation of errors were so prejudicial as to justify reversal. Inasmuch as we have found defendant's preceding assignments of error to be without merit, it necessarily follows that this assignment of error is also without merit.

The judgment and sentence is accordingly *AFFIRMED*.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA, HONORABLE CHARLES L. OWENS, JUDGE,

FLYNN NOYE HICKS, appellant, was charged and convicted for the offense of Unlawful Distribution of a Con-

trolled Dangerous Substance; was sentenced to forty (40) years' imprisonment, and appeals. Judgment and sentence *AFFIRMED.*

JOHN T. ELLIOTT
Public Defender of Oklahoma County
DAVID W. LEE
Asst. Pub. Defender
JANE F. WHEELER

Attorney for Appellant

LARRY DERRYBERRY
Attorney General
JOE H. ENOS
Asst. Atty. Gen.

Attorneys for Appellee

OPINION BY BUSSEY, J.

CORNISH, P. J. and BRETT, J. CONCUR.

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

No. F-77-751

[Filed April 6, 1979]

FLYNN NOYE HICKS, APPELLANT

—*vs.*—

THE STATE OF OKLAHOMA, APPELLEE

ORDER DENYING PETITION FOR REHEARING AND ISSUANCE OF MANDATE FORTHWITH

On the 23rd day of March, 1979, a Petition for Rehearing was filed in case number F-77-751. After thorough consideration of the issues raised and the authorities cited, we are of the opinion that the Petition for Rehearing should be denied.

IT IS THE FURTHER ORDER of this Court, that the Mandate issue FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this 6th day of April, 1979.

/s/ Tom R. Cornish
TOM R. CORNISH
Presiding Judge

/s/ Tom Brett
TOM BRETT
Judge

/s/ Hez J. Bussey
HEZ J. BUSSEY
Judge

ATTEST:

/s/ Ross N. Lillard, Jr.
Clerk

SUPREME COURT OF THE UNITED STATES

No. 78-6885

FLYNN NOYE HICKS, PETITIONER

v.

OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Oklahoma.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 26, 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 309245 207

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SUPREME COURT, U.S.

No. 78-6885

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FLYNN NOYE HICKS

Petitioner,

v.

THE STATE OF OKLAHOMA

Respondents.

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

JANET L. COX
ASSISTANT ATTORNEY GENERAL
CHIEF, FEDERAL DIVISION

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENTS

September, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FLYNN NOYE HICKS, Petitioner,	)	
v.	)	No. 78-6885
THE STATE OF OKLAHOMA, Respondents.	)	

BRIEF OPPOSING CERTIORARI

COMES NOW Jan Eric Cartwright, Attorney General for the State of Oklahoma, by and through Janet L. Cox, Assistant Attorney General, and on behalf of the State of Oklahoma and for answer to the Petition for Writ of Certiorari submits to this Honorable Court the following brief in opposition thereto.

I.

JURISDICTION

Petitioner Hicks seeks review pro se by way of Petition for Writ of Certiorari from the Oklahoma Court of Criminal Appeals. On the 3rd day of March, 1979, the aforesaid court entered its Order affirming the Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, on the 14th day of April, 1977.

II.

ISSUES PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals' failure to modify the Judgment and Sentence imposed by the trial court under the unconstitutional provisions of 21 O.S. Supp. 1977, § 51(B) constitutes a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the trial court's instruction to the jury as to the imposition of punishment based upon an unconstitutional provision of the Oklahoma Habitual Criminal Act, 21 O.S. Supp. 1976, § 51(B), constituted a violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether the imposition of a forty (40) year prison term for the offense of Unlawful Distribution of a Controlled Dangerous Substance, After Former Conviction of a Felony, in violation of 63 O.S. Supp. 1976, § 2-401, is excessive and constitutes cruel and unusual punishment within the purview of the Eighth Amendment to the United States Constitution.

III.

STATEMENT OF THE CASE

Petitioner, Flynn Noye Hicks, hereinafter referred to as "Mr. Hicks," was charged conjointly by information with Diane Elizabeth Jones in the District Court, Oklahoma County, State of Oklahoma, Case No. CRF76-4597, for Unlawful Distribution of a Controlled Dangerous Substance, in violation of 63 O.S. Supp. 1976, § 2-401, After Former Conviction of two (2) Felonies, to-wit: Burglary in the Second Degree and Assault and Battery with a Dangerous Weapon with Intent to do Bodily Harm (O.R. 1). Mr. Hicks was tried by jury on April 12, 13 and 14, 1977, and represented by counsel. The jury thereafter returned a verdict of guilty for the offense of Unlawful Distribution of a Controlled Dangerous Substance and assessed punishment during the bifurcated sentencing proceeding in accordance with the enhancement provisions of 21 O.S. Supp. 1976, § 51(B) at forty (40) years imprisonment under the custody and control of the Oklahoma Department of Corrections.

Mr. Hicks subsequently perfected his appeal from the aforesaid Judgment and Sentence to the Oklahoma Court of Criminal Appeals, Case No. F-77-751. Thereafter, on the 3rd day of March, 1979, the aforesaid court denied Mr. Hicks' request for reversal or modification of the punishment and affirmed the verdict and decision of the trial court in an unpublished opinion.

Petitioner Hicks now comes to this Court requesting the following relief: (1) grant a Writ of Certiorari to review the final Judgment No. F-77-751 of the Oklahoma Court of Criminal Appeals, (2) appoint an attorney to represent petitioner in this Court, (3) hold Oral Arguments, and (4) vacate final Judgment No. F-77-751 of the State Court with instructions [to] vacate

the Petitioner's forty (40) years and thereafter to allow the petitioner an opportunity to be heard at a new penalty trial prior to the imposition of any new sentence.

In addition, on or about August 20, 1979, Petitioner Hicks filed with this court an Application to consolidate this case, pursuant to Rule 43(5), with Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978), cert. granted, May, 1979, now pending for consideration on the merits before this Court.

IV.

STATEMENT OF THE FACTS

The relevant facts pertaining to the issues presented in the case at bar indicate that this matter came on for jury trial on the 12th day of April, 1977. The State called three (3) witnesses whose testimony established that on October 5, 1976, Mr. Hicks consummated a sale involving a balloon of heroin with Agents of the Oklahoma Bureau of Narcotics and Dangerous Drugs for a purchase price of $25.

The defense called one witness, the Court Reporter, concerning the whereabouts of the transcript of the Preliminary Hearing.

Whereupon, after instructions and closing arguments, the jury retired and returned a verdict of guilty against Mr. Hicks for the offense of Unlawful Distribution of a Controlled Dangerous Substance.

In the second phase of the trial, conducted for the purpose of assessing punishment, the State called two (2) witnesses. The first witness, W. L. Curlee, identified Mr. Hicks as one in the same person named in the Judgment and Sentence (State's Exhibit number 5) in "State of Oklahoma versus Flynn N. Hicks," case number CRF-70-1250, Burglary in the Second Degree, wherein Mr. Hicks entered a voluntary plea of guilty and was represented by counsel (Tr. 166).

The State then called Eddie Hockletubbe as its second witness. The witness identified State's Exhibit #6 as the Judgment and Sentence Suspended on Plea of Guilty, Case No. CRF-75-2198, styled The State of Oklahoma versus Flynn N. Hicks, for the

offense of Assault with a Dangerous Weapon with Intent to do Bodily Harm. The witness identified Mr. Hicks as one and the same person named as the defendant in State's Exhibit #6 (Tr. 168).

The Court then instructed the Jury as follows (O.R. 16):

> "You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.
>
> "Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.
>
> "Should you find that this defendant had previously been convicted of only one felony offense at the time he committed the present offense, then you shall assess his punishment at imprisonment in the State Penitentiary for a term not less than ten (10) years.
>
> "Should you find that this defendant has not been previously convicted of any felony offenses, then you shall assess his punishment at imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00)."

The prosecutor then submitted his argument and the following excerpts from the transcript reflect comments of the State's attorney (Mr. Geb) concerning the "mandatory" forty (40) years:

> "It's mandatory the Legislature said, as Your Honor read to you in the Instructions. And the Judge sets the law out, I don't and the other attorneys don't.
>
> "It is mandatory that they get forty years if you find that he has been convicted of two felonies before. And you've heard the evidence that he had been." (Tr. 172, lines 14-19)
>
> • • •
>
> "and the State would be interested in hoping that you take a strong stand on the pusher and find them guilty. And take a

strong stand and return a verdict of fifteen years as punishment for her, and a term of forty years as set out in the statutes as mandatory by the State Legislature." (Tr. 173, lines 14-19)

Defense counsel (Mr. Pearson) then responded as follows:

"When the District Attorney says mandatory forty years, that is not quite true. If you should find from your -- by your verdict certain things, then the law says that you've got to do it.

"But you don't have to find those things. You are the judges of the facts." (Tr. 174, 175)

In his final closing appeal to the Jury for the State, Mr. Geb again commented as follows:

"And Mr. Pearson, I thought heard the Court's Instructions. The Court's Instructions were that under number four. You may like to read this.

"'Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.'

"Forty years. I don't see how he can tell you to ignore the two previous felony convictions. You have heard the testimony. He even stipulated." (Tr. 179, 180)

Upon the conclusion of Mr. Geb's comments, the Jury retired to deliberate the punishment of Mr. Hicks. They assessed punishment at forty (40) years.

From these facts, Petitioner raises constitutional errors for this Court's determination.

ARGUMENT AND AUTHORITY

PROPOSITION I

PETITIONER WAS NOT DENIED EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BY REASON OF THE OKLAHOMA COURT OF CRIMINAL APPEALS' FAILURE TO MODIFY THE TERM OF PUNISHMENT.

In essence, Mr. Hicks contends that he was denied equal protection of the law as a result of being sentenced at the trial court level pursuant to 21 O.S. Supp. § 51(B). The aforesaid statutory provision was declared unconstitutional by the Oklahoma Court of Criminal Appeals in the decision of Thigpen v. State,

Okl.Cr., 571 P.2d 467 (Oct. 14, 1977). 21 O.S. Supp. 1977, § 51(B) provided as follows:

"Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect punishment by death in all crimes now or hereafter made punishable by death."

Under this provision, Mr. Hicks in the instant case was sentenced to twenty (20) years, plus the maximum sentence provided by 63 O.S. Supp. 1976, § 2-401, for a total of forty (40) years.

The ambiguity inherent in the practical application of § 51(B) resulted in a defendant with two or more prior offenses being limited to a term of twenty (20) years plus the maximum assessable punishment for conviction under the new charge. However, an offender with one offense was subject to an indefinite period of confinement not less than ten (10) years. As the Oklahoma court determined in its opinion, § 51(B) defeated the obvious intent of the Legislature to authorize progressively greater punishment for habitual criminals.

In declaring § 51(B) unconstitutional, the Court was faced with the problem of what punishment should be assessed in those cases where the trial court had instructed under § 51(B).

Inasmuch as 21 O.S. Supp. 1976, § 51 contained a severability clause, the remaining provisions, specifically § 51(A), were not impaired. Title 21 O.S. § 51(A), left intact by the Oklahoma Court in Thigpen, reads:

"Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

> "1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term of not less than ten (10) years.
>
> "2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.
>
> "3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years."

Thus, in reviewing cases subsequent to Thigpen, supra, the Oklahoma Court of Criminal Appeals has taken one of two approaches in reviewing the assessed punishment. The first approach, as alluded to by Mr. Hicks, resulted in a modification of the sentence in the "interest of justice." Lee v. State, Okl.Cr., 572 P.2d 260 (Nov. 9, 1977). It is interesting to note from a reading of the Lee case, supra, that the court was concerned about certain prejudicial remarks made by the prosecuting attorney during the course of the trial. On the basis of the improper remarks, as opposed to a sentence imposed under § 51(B), the punishment was modified.

The second approach is reflected in the decisions of Kitchens v. State, Okl.Cr., 576 P.2d 775 (March 27, 1978) and Barrett v. State, Okl.Cr., 573 P.2d 1221 (January 25, 1978). In these cases, no modification of sentence was made since the sentence imposed was clearly permissable and within the provision of 21 O.S. Supp. 1976, § 51(A), which would have been the proper statute for sentencing the twice previously convicted defendant. Further, the Court found no prejudicial errors in these cases as in the Lee case, supra, which required modification of the sentence.

However, it is this alleged "ad hoc" approach taken by the Oklahoma Court of Criminal Appeals subsequent to Thigpen, supra,

which apparently forms the basis of Petitioner's claim of a denial of equal protection under the Fourteenth Amendment.

The inherent power of the Court of Criminal Appeals to modify sentences on appeal is clearly authorized under the statutory provisions of the laws of the State of Oklahoma. Title 22 O.S. 1971, § 1066 states:

> "The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the Court within the time, and in the manner to be prescribed by rule of the Court."

The Oklahoma Court has consistently exercised its right to correct or modify sentences on appeal for a myriad of reasons. Such action has repeatedly been upheld. See Carbray v. State, Okl.Cr., 435 P.2d 188 (1967), cert. den., 392 U.S. 916 (1968).

In the case at bar, the Court of Criminal Appeals reviewed all the testimony and found no errors requiring reversal or modification of the sentence. They further determined that the forty (40) years assessed by the Jury was well within the purview of § 51(A). Hicks v. State, Okl.Cr., Unpub. Op. No. 77-751.

It is further well established that federal appellate courts are without power to control or modify a sentence which is within the limits fixed by a valid statute unless clearly excessive. In Hayes v. United States, 238 F.2d 318, 322, cert. den., 353 U.S. 983, 77 S. Ct. 1280, 1 L. Ed. 2d 1142, this court stated:

> "The fixing of penalties for crimes is a Congressional function, and what constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual." (Emphasis added)

This Court has previously adopted language found in the Tenth Circuit case of Smith v. United States, 273 F.2d 462 (10th Cir. 1959), which, in discussing the aspects of modifying a sentence of fifty-two (52) years for a first-time offender and which they considered "greater than should have been imposed," stated at page 468:

> "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radzinowicz, A History of English Criminal Law: The Movement for Reform, 1750-1833, passim, these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. See 7 Edw. VII, c. 23, § 4(3); 16 & 17 Geo. V., c. 15, § 2(4). This Court has no such power."

Respondents submit that the Constitution of the United States permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. See Williams v. Illinois, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. 2018 (1970).

Petitioner falls within those class of cases where punishment was imposed under a section of the Habitual Criminal Act subsequently determined invalid, but which did not impair the remaining provisions of the Act. Within those class of cases, the Oklahoma Court of Criminal Appeals has exercised its inherent power, on a case by case basis, to correct the sentence through modification, or alternatively, to affirm the ultimate findings of the jury or trial court.

In summation, it is clear that Petitioner has failed to prove a "purposeful discriminatory" action. Snowden v. Hughes, 321 U.S. 1, 8, 9, 88 L. Ed. 497, 502, 503, 64 S. Ct. 397. Therefore, Respondents submit that there has been no Constitutional violation of the Equal Protection Clause of the Fourteenth Amendment and Petitioner's claim of constitutional infringement must fail.

PROPOSITION II

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BY VIRTUE OF THE OKLAHOMA COURT OF CRIMINAL APPEALS FAILURE TO REMAND THIS CONVICTION FOR RESENTENCING IN THE DISTRICT COURT.

Petitioner urges that he has an absolute right to have a new sentencing trial or a new penalty stage and cites decisions of this Court as authority for his position as follows: United States v. Jackson, 390 U.S. 5&0, 20 L. Ed. 2d. 138, 88 S. Ct. 1209 (1968); Bordenkircher v. Hayes, 434 U.S. 357, 54 L. Ed. 2d. 64, 98 S. Ct. 663, reh. den., 435 U.S. 918, 55 L. Ed. 2d. 511, 98 S. Ct. 1477 (1978); Corbitt v. New Jersey, ___ U.S. ___, 58 L. Ed. 2d. 466, 99 S. Ct. 492 (December 11, 1978); Gardner v. Florida, 430 U.S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977); Presnell v. Georgia, ___ U.S. ___, 58 L. Ed. 2d. 207, 99 S. Ct. 235 (November 6, 1978). As Mr. Hicks noted in his Petition for Certiorari at Page Nine (9), "each case is distinguishable from the facts here." Respondents would agree that the above cited cases fail to shed any light on the issue of due process under the facts of the instant case.

In Oklahoma pursuant to 22 O.S. 1971, § 926, a defendant has a right to request a jury to set his punishment, but if for some reason the jury fails to do so, then it is encumbent on the trial curt to pronounce the sentence. See 22 O.S. 1971, § 927. These provisions read in conjunction with 22 O.S. 1971, § 1066 allowing the appellate court to modify sentences from the basis of Oklahoma's standards rgarding sentencing. While in some jurisdictions the petitioner's case might have had to be remanded for a new second stage trial, in Oklahoma it is not necessary and is not a violation of due process. See Drennan v. State of Oklahoma, Okl.Cr., 581 P.2d 901 (1978), cert. den. No. 70-1250 (December 4, 1978).

It is fundamental that the Due Process Due Clause of the Fourteenth Amendment affords an accused certain procedural safeguards within the confines of criminal justice to insure the preservation of life, liberty and the pursuit of happiness against the arbitrary action of the body politic. In Screws v. United

States of America, 325 U.S. 91, 89 L. Ed. 1503, 65 S. Ct. 1031 (1945), this court stated in the body of its opinion, quoting from Twining v. New Jersey, 211 U.S. 78, 101, 53 L. Ed. 97, 107, 29 S. Ct. 14:

> ". . . that due process requires that 'no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in hi private right, and guard him against the arbitrary action of government."

In Snyder v. Massachusetts, 291 U.S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575, it was said that due process prevents state action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In the case at bar, Mr. Hicks received a fair and impartial trial; was represented by counsel; was given the opportunity to cross-examine his accusers; and exercise his right against self-incrimination and correctly sentenced under the existing law. In essence, he was accorded the basic fundamental procedural aspects of due process as envisioned by the Fourteenth Amendment.

If Petitioner was deprived of "liberty," Respondents submit that it was not by reason of a denial of due porcess, but rather through the imposition of an excessive sentence in violation of the Eighth Amendment prohibition against cruel and unusual punishment.

In conclusion, Respondents submit that there exists no vehicle in the State of Oklahoma whereby Mr. Hicks may be resentenced at a "new penalty stage" in the District Court. The jury assessed punishment after hearing testimony reflecting the facts of the case. A "new penalty stage" in effect would require a new criminal trial in its entirety.

It is further clear that should punishment be reimposed in accordance with 21 O.S. Supp. 1976, § 51(A), a term of imprisonment could be assessed against Mr. Hicks from ten (10) years to life, resulting in a concededly greater punishment than the forty (40) years he received.

It is, therefore, respectfully submitted that Mr. Hicks' allegations of a denial of due process falls exceedingly short of raising a fundamental constitutional issue upon which relief may be granted by this Honorable Court.

PROPOSITION III

THE IMPOSITION OF A FORTY (40) YEAR PRISON TERM FOR THE OFFENSE OF UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE, AFTER FORMER CONVICTION OF A FELONY, IS NOT EXCESSIVE AND DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Under the facts adduced below during the second phase of the sentencing trial, the evidence and testimony established that Mr. Hicks had previously been convicted of two prior felonies. On June 4, 1970, Mr. Hicks entered a voluntary plea of guilty to the charge of Burglary in the Second Degree, Case No. 70-1250. Thereafter, on October 21, 1975, Mr. Hicks again entered a voluntary plea of guilty to the charge of Assault with a Dangerous Weapon with intent to do Bodily Harm, Case No. 75-2198. Mr. Hicks received suspended jail terms in both cases.

Under the then existing Oklahoma law, 21 O.S. Supp. 1976, § 51(B), the trial court instructed the jury that a mandatory sentence of forty (40) years should be imposed in the event the jury found the Petitioner to have committed two (2) prior felonies.

As discussed in Propositions I and II, § 51(B) was declared unconstitutonal by the Oklahoma Court of Criminal Appeals subsequent to the imposition of punishment in the case at bar.

It is the position of Mr. Hicks that a forty (40) year prison term is excessive and constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The present test enunciated by this court in reviewing sentences as "excessive" and violative of the Cruel and Unusual Clause of the Eighth Amendment is reflected in the case of Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1976). Although this Honorable Court has never held punishment unconstitutional because of length alone, the "proportion-

ality concept" is equally applicable under the facts herein presented. In Coker supra, this court, citing from Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976), stated:

> "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to the accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.

Under the first criteria, Oklahoma's Habitual Criminal Act was intended by the Legislature to authorize progressively greater punishment for habitual criminals. That intent was not destroyed by the invalidation of 21 O.S. Supp. 1976, § 51(B), but prevails in the remaining provisions of the Act.

Thus, it is clear that a rational basis exists to justify enhancement of the length of a prison term for criminal offenders habitually found ignoring the rights of innocent victims.

Secondly, under 63 O.S. Supp. 1976, § 2-401 Petitioner received the maximum term of twenty (20) years. A myriad of State Court decisions have rejected the theory of excessive punishment in similar cases involving Distrbution of a Controlled Dangerous Substance wherein the sentence reflects a term of twenty (20) years or more. See People v. Keller, 54 Cal. Rptr. 154 (1966), People v. Tuckey, 234 N.E.2d 26 (Ill. 1967); People v. Venable, 361 N.Y.S.2d 398 (1974); Seguro v. State of Texas, 427 S.W.2d 865 (Tex. 1968); Williams v. State of Texas, 476 S.W.2d 675 (Tex. 1972); State v. Coutchen, 424 P.2d 865 (Kan. 1967); State v. Abercrombie, 318 N.E.2d 179 (Ohio 1973); Rodriguez v. State, 509 S.W.2d 625 (Tex. 1974); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1974); State v. Espinosa, 101 Ariz. 474, 421 P.2d 322 (1966); State v. Harms, 507 S.W.2d 29 (La.1974).

Further, a limited review of the laws from other states reveals a similar intent to authorize enhanced prison terms for habitual criminal offenders. [1]

These Recidivist statutes have been upheld many times against a variety of challenges. [2]

In a recent Fourth Circuit case, Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978), the court overturned a district court decision which found two twenty year consecutive terms for distribution and possession of marijuana as excessive in violation of the cruel and unusual prohibition of the Eighth Amendment. The defendant in the Davis case, supra, relied primarily on Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. den., 415 U.S. 938, 94 S. Ct. 1454, 39 L. Ed. 2d. 495 (1974). The district court borrowed from Hart the guidelines which were used in that decision to determine the constitutionality of the sentence imposed. At page 1231 of the Davis decision, the Fourt Circuit noted those guidelines.

> "The guidelines included the nature of the offense committed, the legislative purpose behind the punishment, the punishment imposed in other jurisdictions for the same offense, and the punishment imposed in the same jurisdiction for other offenses.

The Court determined that the scope of their inquiry as to excessiveness of the punishment need not be as broad as the inquiry in Hart where a life sentence was imposed. The Court went on to say:

---

1 Kansas, KSA 21-4504; Arizona, ARS § 36-1002.02; Michigan, MCLA §§ 335.152, .341; Texas, UTCA Penal Code § 12.42(D); Missouri, RS. Mo. VAMS § 195.200; Wisconsin, WSA, § 161.28; Nebraska, R.R.S. § 29-2221 (Hab. Crim. Stat.); Minnesota, 26 USCA § 2591(a) New York Narcotic Drug Impact § 2, 21 U.S.C.A. §§ 173, 174.

2 Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d. 446 (1961); Gryger v. Burke, 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948); Graham v. West Virginia, 224 U.S. 616, 623 (1912); McDonald v. Massachusetts, 180 U.S. 311, 312, 21 S. Ct. 389, 45 L. Ed. 542 (1901); Moore v. Missouri, 159 U.S. 673, 677, 16 S. Ct. 179, 40 L. Ed. 301 (1895); Wilson v. Slayton, 470 F.2d 986 (4 Cir. 1972); Wessling v. Bennett, 410 F.2d 205 (8 Cir. 1969); Price v. Allgood, 369 F.2d 376 (5 Cir. 1966) cert. denied, 386 U.S. 998, 87 S. Ct. 1321, 18 L. Ed. 2d. 349 (1967); see generally, Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99 (1971).

> "In an attack for excessiveness on a sentence for a number of years, any authorized inquiry of the court should extend only to the consideration of the seriousness of the offense committed and the application of the sanction imposed for that offense. We can give no relief unless the sentence imposed is "grossly disproportionate to the severity of the crime." Ingraham v. Wright, 430 U.S. 651, 667, 97 S. Ct. 1401, 1410, 51 L. Ed. 2d 711 (1977). And in those cases where the challenged sentence is fixed by a jury within the limits imposed by statute, we afford special deference to the legislative and jury determination of the seriousness of the offense, and whether the punishment is cruel and unusual. See Gregg v. Georgia, 428 U.S. 153, 174-184, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Thus, the sentence will not be considered grossly disproportionate to the severity of the offense unless tere are "extraordinary and special circumstances" which make an otherwise valid sentence cruel and unusual. United States v. Wooten, 503 F.2d 65, 67 (4th Cir. 1974).

The Court thereupon concluded that there was no extraordinary and special circumstances, and was of the opinion that the sentences were not so excessive as to shock human sensibilities.

In the case at bar, it is clear that the prior crimes committed by Mr. Hicks involved the potentiality of violence and danger to life as well as property. Such crimes cannot be considered "trivial" under the arguments presented in Rummel v. Estelle, now pending before this court.

In light of the similarity of sentences imposed in other jurisdictions; the nature of the present offense and the severity of prior offenses, Respondents submit that the forty (40) year sentence in this case is not "grossly disproportionate" to the accepted measure of punishment.

It is further Respondents position that the instructions complained of by Mr. Hicks did not hamper the jury's initial decision of guilt. Concededly, the jury imposed the "mandatory" sentence, but upon a review of the case by the Oklahoma Court of Criminal Appeals, it is clear that the punishment was well within the remaining provisions of the Habitual Criminal Act.

Therefore, Respondents urge this court to affirm the judgment and sentence and determine that the sentence resides out-

side the boundary of those cases which create a violation of the cruel and unusual punishment provision of the Eighth Amendment.

CONCLUSION

Oklahoma contends that there was no "purposeful discriminatory" action imposed by the Court of Criminal Appeals in refusing to modify the term of punishment which resulted in a denial of equal protection. Nor was there a denial of due process by reason of the Court of Criminal Appeals failure to remand the case for further proceedings in light of its prior holding in Thigpen, supra. Even though the sentence imposed was under a section of the Oklahoma Habitual Criminal Act declared unconstitutional, the remaining provisions of the Act were not impaired and the sentence was clearly within the boundaries of the intact portion of the Act.

Finally, the forty (40) year term is clearly within the accepted sphere of punishment followed in other jurisdictions for offenses of this nature. That it was enhanced by virtue of Mr. Hicks prior criminal acts clearly follows the Legislative intent to authorize progressively greater sentences for habitual offenders.

Respectfully submitted,

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FOR ARGUMENT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

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v.

THE STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

In its Statement of the Case, the State of Oklahoma disputes petitioner's assertion that he was not given an opportunity to present evidence to the jury in mitigation of punishment. The State asserts "to the contrary" that petitioner elected to "stand mute" during the bifurcated stage of the sentencing proceeding at the trial court level. What the State fails to point out is that any evidence or argument in mitigation of punishment would have been

futile and, indeed, irrelevant where the jury was allowed no discretion to exercise leniency in sentencing. The Oklahoma mandatory sentencing statute, 21 O.S. Supp. 1977, §51(B), required that petitioner be given a 40-year term upon a jury finding that he had been convicted of two prior felonies.

Petitioner also takes issue with the State's account of his prior convictions. First, there were only two such prior convictions rather than three as alleged at page 7 of the Respondent's Brief. Second, while the State of Oklahoma notes correctly that petitioner was previously convicted of Second-degree Burglary, his second conviction was only for Assault and Battery with a dangerous weapon with intent to do bodily harm, rather than the more serious offense alleged at page 33 of the Respondent's Brief.

ARGUMENT

The State of Oklahoma, in its Brief, failed to raise any substantial new issues. Therefore, an extended reply brief is not necessary. Detailed responses to respondent's arguments, where essential, will be presented on oral argument. However, insofar as respondent's characterization of several key issues is potentially misleading, and in order to avoid confusion at oral argument, several brief points ought to be made at this time.

I.

PETITIONER WAS DENIED PROCEDURAL DUE PROCESS WHEN THE OKLAHOMA COURT OF CRIMINAL APPEALS SENTENCED HIM TO 40 YEARS IMPRISONMENT UNDER THE OKLAHOMA HABITUAL CRIMINAL STATUTE 21 O.S. Supp. 1977, §51(A).

A. The Court of Criminal Appeals Violated Due Process When It Failed to Follow Oklahoma Law Which Entitled Petitioner to be Sentenced by a Jury.

The State of Oklahoma argues that because 22 O.S. §1066 grants the Oklahoma Court of Criminal Appeals the power to modify sentences, this Court should uphold the action of the Court of Criminal Appeals in resentencing petitioner as a simple act of sentence "modification."

Plainly, what the Court of Criminal Appeals has worked in this case is not a "modification" but a resentencing. Oklahoma law is clear that a sentence imposed under an unconstitutional statute (as §51(B) has already been declared to be) is void and of no effect. *Brown v. State*, 24 P.2d 1013 (Okl.Cr. 1933); *Karns v. State*, 224 P. 373 (Okl.Cr. 1924); see also *Ex Parte Lange*, 18 Wall. 163, 85 U.S. 872, 879. Further, the sentence imposed by the Court of Criminal Appeals was not a mere modification of sentence length under the same statute upon which the petitioner was originally sentenced. Instead, it was the institution of a sentence under a *different* statute which presented *different* sentencing criteria. There has been no initial exercise of sentencing discretion by the jury for the

appellate court to "modify." Instead, the first and only exercise of sentencing discretion was by the Court of Criminal Appeals. This is an act *de novo*, not an act of modification. Petitioner was thus denied his right to jury sentencing guaranteed by Oklahoma law in 22 O.S. §926, which reads:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant, assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

There is a touch of inconsistency in Oklahoma's Brief. It acknowledges first that its Court of Criminal Appeals has the power to modify a sentence under §1066 *only* "where it is apparent that an injustice has been done" (Br. of Resp. at 17), and the sentence is "so excessive as to shock the conscience of the court" (Br. of Resp. at 7, 38). If the former sentence is subject to modification only if it is conceded to be fundamentally unjust and shockingly excessive, how then can the State of Oklahoma justify the second sentence which was *identical* to the first and which accorded the petitioner even less procedural safeguards than did the first sentencing procedure?[1]

The State of Oklahoma then asserts that a criminal defendant's right to jury sentencing in Oklahoma is not absolute, citing 22 O.S. §927, which provides:

> Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court

[1]At least the petitioner was physically present during the first sentencing procedure.

> shall assess and declare the punishment and render the judgment accordingly.

It is clear from the cases, however, that this auxiliary sentencing power of the court is not to be exercised except in cases where a jury is hopelessly deadlocked. *Shanahan v. State*, 354 P.2d 780 (Okl.Cr. 1960). Furthermore, in *Epperson v. State*, 181 P.2d 292 (Okl.Cr. 1947) (overruled on other grounds, *Fulton v. State*, 491 P.2d 789 (1971)), the Court of Criminal Appeals held that the defendant had to be resentenced by the jury where the initial sentence was found to have been under the wrong section of the habitual offender statute.

If anything is clear from the record, it is that the only jury to ever consider petitioner's sentence did *not* fail to agree on a sentence nor was there any deadlock. Indeed, there was nothing for the jury to disagree about as it was instructed that 21 O.S. Supp. 1977, §51(B), expressly required that the jury return a mandatory sentence of 40 years imprisonment. The triggering event for §927 never occurred, nor did the Court of Criminal Appeals below even seek to justify its authority to impose a new sentence under this statute.[2]

[2]The State of Oklahoma cites *Rose v. Hodges*, 423 U.S. 19, for the proposition that a defendant does not have a United States Constitutional right to be resentenced by jury following reversal of his first sentence. This misses the point of petitioner's argument entirely. Petitioner is not arguing that the United States Constitution establishes a right to be sentenced by a jury—either initially or upon any resentencing that may occur. What petitioner *is* asserting is that the United States Constitution requires a state to follow its own criminal procedures in convicting and sentencing its defendants and, if a deviation from such procedures results in a potentially grievous injury to any defendant's protected liberty interests, then due process have been denied such defendant. Oklahoma has *chosen* to give all its defendants a right to be

(continued)

The State of Oklahoma stands convicted by the clear language of its own statutes, by its own judicial precedent, and by straightforward logic. It simply took a shortcut in resentencing petitioner and that deviation deprived petitioner of an admittedly sacred right to be sentenced by jury. When this deviation potentially inflicted a grievous loss upon petitioner's constitutionally protected liberty interests (acknowledged to be such at page 18 of Respondent's Brief), it constituted a violation of the Due Process Clause.

B. The Court of Criminal Appeals Violated Due Process When It Imposed a New 40-Year Discretionary Sentence Against Petitioner Without Giving Him Notice, a Hearing, or an Opportunity to Present Mitigating Evidence.

The State of Oklahoma concedes the main point asserted in this section of Petitioner's Brief that due process requires a sentencing procedure that affords the defendant notice, a hearing and an opportunity to present mitigating evidence (Br. of Resp. at 20–22).

The State advances only two defenses. First, it asserts that, while these "basic due process requirements [are] . . . applicable [at] . . . the trial court level," they are inapplicable when the sentence is imposed by the appellate court (Br. of Resp. at 21). It should not be surprising that the State

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(footnote continued from preceding page)
sentenced by jury. The State acknowledges this at page 24 of its Brief. Having given this right, it cannot be withheld from Hicks without violating the Due Process Clause of the U.S. Constitution. Otherwise, the *Rose* case is quite inapposite as the only question decided there was whether, under Tennessee law, a governor has the executive power to commute a sentence after the court has set it aside. No such issue is presented in our case.

of Oklahoma is unable to advance even one authority for this proposition that an appellate court may ignore with impunity the basic due process requirements that bind the trial court. Petitioner's 40 years in prison will seem as long to him regardless of whether that sentence was unconstitutionally imposed upon him without notice or hearing by the trial court or the appellate court.

The only other argument advanced by the State of Oklahoma is that petitioner was afforded an opportunity to present mitigating factors before the jury and that he had three opportunities to plead for leniency: before the jury; before the trial court at the time the sentence was entered; and before the appellate court. The State then asks, "How many opportunities must the State afford to a particular offender to persuade the trier of punishment to impose leniency . . . ?"

Let us look briefly at these three opportunities. Before the jury, petitioner was being tried under 21 O.S. Supp. 1977, §51(B), which authorized no jury discretion for leniency at all. The jury was instructed that,

> [S]hould you find that this defendant has been twice convicted of felony offenses . . . then you shall assess his punishment at forty (40) years . . . . (A. 9)

The prosecutor jumped on this theme by arguing,

> It is mandatory that they get forty years if you find that he has been convicted of two felonies before. (A. 20)
>
> And I—the State doesn't feel that there is really any alternative on it . . . . (A. 25)

Evidence of mitigation was irrelevant and would undoubtedly have been excluded. Argument for leniency would have been a useless act because even the State admits that the jury had no choice. Clearly there was no hearing

opportunity here to present evidence of mitigating factors upon which a proper exercise of sentencing discretion could be based.

Let us turn to the "opportunity" that petitioner had to present mitigating evidence or to plead for leniency before the trial judge at the time he entered the 40-year sentence found by the jury. 22 O.S. §926 required the trial judge to enter judgment in accordance with the jury-determined sentence, and 22 O.S. Supp. 1977, §991a, forbids a trial judge from suspending any part of a sentence when the defendant being sentenced has had two or more prior felony convictions. The trial judge well understood his powerlessness to exercise sentencing discretion or to consider mitigating evidence or a plea for leniency when he didn't even bother to order a presentencing report on petitioner. The trial court mechanistically entered judgment on the jury verdict of forty years (A. 42–44).

On appeal to the Court of Criminal Appeals, petitioner's "opportunity" to argue leniency under 21 O.S. Supp. 1977, §51(A), was even more illusory. He didn't even know he was to be sentenced under §51(A) until after his appeal was ruled upon. He has no hearing before the Court of Criminal Appeals and absolutely no warning that the court would sentence him under the discretionary standards of §51(A) until it was a *fait accompli*.

Under any fair reading of the facts in this case, the State of Oklahoma has practically conceded error on this point.

C. The Court of Criminal Appeals Violated Due Process When It Sentenced Petitioner to 40 Years Imprisonment Under a Statute that Allowed Wide Sentencing Discretion But Provided No Meaningful Standards to Guide That Discretion.

The State of Oklahoma advances no new arguments in this section of its Brief, so no reply is necessary.

D. The Court of Criminal Appeals Violated Due Process When It Failed to Offer Any Rationale or Basis For the Sentence That It Imposed Against Petitioner.

Once again the State of Oklahoma does not really take issue with the constitutional standard that a discretionary sentence must be supported by an adequate rationale explaining the particular sentence imposed (Br. of Resp. at 30). However, the State argues that the Court of Criminal Appeals advanced an adequate rationale in its Opinion and in the record before it.

We start with the record itself. There was no presentence report and no evidence in the record of the petitioner's background or any mitigating circumstances. There is nothing in the record explaining or shedding any light on the prior felony convictions beyond the mere recitation of the statutory sections violated. The appellate court never even laid eyes on petitioner before it exercised its sentencing discretion against him. At no time did petitioner or his court-appointed counsel ever have a hearing or opportunity to argue for leniency under §51(A). The record is totally inadequate to enable any sentencing authority to exercise its

discretion in any balanced and informed manner.

We turn next to the Opinion itself of the Court of Criminal Appeals. Here the only rationale advanced by the Court of Criminal Appeals is that 40 years is "within the range of punishment authorized by the provisions of 21 O.S. Supp. 1977, §51(A)" (A. 58). But this authorized range is from 10 years to life! This tells us nothing of the basis upon which the discretion was exercised to give Hicks 40 years rather than 10 years or life. In a great many cases, this Court has found an abuse of discretion in sentencing even though the sentence was within the range permitted by the statute. (See cases cited at pp. 57–58 of Petitioner's Brief.)

It seems elemental that before the exercise of discretion can be tested for abuse, the bases for the exercise of such discretion must be set forth by the discretion-exercising body so that it can be reviewed on appeal. This much is required when parole is revoked, *Morrissey v. Brewer*, 408 U.S. 471, 489; when probation is revoked, *Gagnon v. Scarpelli*, 411 U.S. 778, 786; when good time credits are revoked, *Wolff v. McDonnell*, 418 U.S. 539, 563; or when welfare benefits are revoked, *Goldberg v. Kelly*, 397 U.S. 254, 271. Can the imposition of a 40-year sentence require any less?

E. The Court of Criminal Appeals Violated Due Process When It Affirmed and Resentenced Petitioner Under a Different Statute Than the One Relied Upon At Trial.

The State of Oklahoma has omitted entirely this section from its Brief and it offers no response to the arguments advanced. Therefore, no reply is needed.

II.

IT WAS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO SENTENCE PETITIONER TO 40 YEARS IMPRISONMENT UNDER 21 O.S. Supp. 1977, §51(A).

A. Punishment Under 21 O.S. Supp. 1977, §51(A) Is Cruel and Unusual Because It Makes No Measurable Contribution to Acceptable Goals of Punishment, But Rather Constitutes Only the Needless Imposition of Pain and Suffering.

The State of Oklahoma misses the point of this argument that the Eighth Amendment requires proportionality: some reasonable relationship between the penalty and the offense. Section 51(A) requires no such relationship and there is not any guidance to the sentencing authority suggesting or requiring such a nexus.

The strongest defense that the State can muster for §51(A) under the Eighth Amendment is the following,

> In summation, the only acceptable formula which can be promulgated in comparing punishment with the seriousness of the offense, must remain flexible; and although the jury may arguably be saddled with unbridled discretion, *it cannot be said that in the majority of cases the decision of the jury to impose a sentence within the limits of the statute has been contra to the rudimentary demands of justice and fair play.* (Emphasis added.) (Br. of Resp. at 36)

We have come to a sad point in history if it is constitutionally sufficient to say that at least a majority of the

sentences meet the rudimentary demands of justice and fair play. This standard will be of little comfort to the minority who may suffer unfair or excessive sentences based on hidden notions of passion, prejudice, or capriciousness because of inadequate legislative guidance and controls requiring proportional sentencing.

The State at page 33 of its Brief asserts that petitioner's argument would allow an offender to commit two murders before the sentence of death could be imposed for a third murder. Not at all. If the Legislature were to decide that a single offense of murder warranted the death penalty, it would do so under current law. At least it would have established a specific relationship between the offense and the punishment. It would not take repeated murders in such a situation to invoke the death penalty. The problem, however, with §51(A) is that there is no legislative effort to relate the punishment to the offense.

B. Petitioner's Sentence Is Cruel and Unusual Because It was Inflicted in an Arbitrary and Capricious Manner.

The only new argument raised by the State here is the reference to the Oklahoma harmless error statute, 20 O.S. §3001. First, of course, is the fact admitted by the State that this statute was not even in force at the time the Oklahoma Court of Criminal Appeals switched statutes on petitioner. More fundamental, it strains credibility to argue that the loss of jury sentencing, the loss of a bona fide and meaningful hearing on sentencing, the loss of a chance to present mitigating evidence, being sentenced under a statute without any proportionality or effective standards, and the loss of a

chance to obtain a minimum 5 or 10 year sentence rather than a 40-year sentence are mere harmless errors.

III.

PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW WHEN HE WAS CLASSIFIED UNDER AN ADMITTEDLY UNCONSTITUTIONAL STATUTE AND THEN, BASED UPON THAT CLASSIFICATION, HE WAS DISCRIMINATED AGAINST BY BEING DENIED STATE AND FEDERALLY GUARANTEED RIGHTS.

The State of Oklahoma throughout its argument slips into the mistaken assumption that the classification of which petitioner complains is the classification between habitual offender and first time offenders. So that there is no mistake, petitioner would again state this is *not* the classification of which he is complaining.

The classification which forms the basis of the equal protection argument is the classification between alleged habitual criminals who were initially prosecuted under the unconstitutional statute §51(B) (and later resentenced under §51(A)) and those alleged habitual criminals who were initially prosecuted under §51(A). On the basis of this admittedly unconstitutional classification, petitioner was deprived of the many fundamental rights pertaining to sentencing procedures discussed in Petitioner's Brief.

Finally, it is worth noting that the State acknowledges that if it were required to resentence those defendants like petitioner who were initially erroneously sentenced under

§51(B), "the fiscal burden which might be incurred . . . would be minimal." Thus, under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, the interests advanced by petitioner for a new sentencing procedure should prevail.

CONCLUSION

Petitioner's sentence should be reversed and this matter should be remanded to the Oklahoma Court of Criminal Appeals for a new sentencing procedure that complies with due process, equal protection and the Eighth Amendment.

Respectfully submitted,

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FLYNN NOYE HICKS, *Petitioner,*

v.

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On Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS, *Petitioner,*

v.

THE STATE OF OKLAHOMA, *Respondent.*

On Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

BRIEF OF PETITIONER

OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma, *Hicks v. Oklahoma,* No. F-77-751, is an unpublished opinion of the Oklahoma Court of Criminal Appeals. It is set forth in the Appendix beginning at A. 57. The "Order Denying Petition for Rehearing" from that court dated April 6, 1979, is reproduced in the Appendix at A. 61. There was no opinion prepared by the District Court of Oklahoma County, Oklahoma, in which court the petitioner was initially tried and convicted.

JURISDICTION

The opinion and judgment of the Court of Criminal Appeals of the State of Oklahoma was entered on March

8, 1979 (A. 57). The "Order Denying Petition for Rehearing" was entered on April 6, 1979 (A. 61). The Petition for Writ of Certiorari was filed on June 21, 1979, and it was granted on November 26, 1979. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

63 O.S. § 2-401 provides as follows:

> A. Except as authorized by this act, it shall be unlawful for any person:
>
> 1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance;
>
> . . . .
>
> B. Any person who violates this section with respect to:
>
> 1. A substance classified in Schedules I or II which is a narcotic drug or lysergic acid diethylamide (LSD) is guilty of a felony and shall be sentenced to a term of imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000). . . .

21 O. S. Supp. 1977, § 51(A) read as follows at the time petitioner was convicted:

> Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:
>
> 1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.
>
> 2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.
>
> 3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years.

21 O.S. Supp. 1977, § 51(B) read as follows at the time that the petitioner was convicted:

> Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony

offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogarte or affect the punishment by death in all crimes now or hereafter made punishable by death.

22 O.S. § 926 reads as follows:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when the State of Oklahoma first sentenced him to 40 years imprisonment under an admittedly unconstitutional mandatory habitual criminal statute, and then upon appeal resentenced him to an identical 40-year term under a different habitual criminal statute that allowed standardless discretion to impose any sentence between 10 years and life imprisonment without according him notice or hearing on such resentencing or an opportunity to present any mitigating evidence, without giving any explanation for the sentence imposed, and without remanding the case for jury sentencing as required by Oklahoma law.

2. Whether it was cruel and unusual punishment to sentence petitioner to 40 years imprisonment for an isolated $50 sale of heroin under an habitual criminal statute that makes no measurable contribution toward any acceptable goal of punishment because it permitted enhanced punishment even though the petitioner had not served any actual time under his previous felony convictions and because the punishment was not made proportional to the offense. Whether it was cruel and unusual punishment for the Court of Criminal Appeals to impose a 40-year sentence upon the petitioner under a discretionary but standardless habitual criminal statute for an isolated $50 sale of heroin without giving petitioner any notice, hearing or opportunity to present mitigating evidence under the statute or offering petitioner any explanation as to why he was being sentenced so much more severely than others similarly situated.

3. Whether petitioner was denied equal protection of the law when the Court of Criminal Appeals classified petitioner under an admittedly unconstitutional statute and then, based upon that classification, discriminated against him by denying him his state-guaranteed right to jury sentencing and his federally guaranteed right to notice, a hearing and a right to present mitigating evidence before sentencing.

STATEMENT OF THE CASE

Flynn Noye Hicks (hereafter "petitioner") and a codefendant Dianne Elizabeth Jones (hereafter "Jones") were charged by Information in the District Court, Oklahoma County, State of Oklahoma, with the Unlawful Distribution of a Controlled Dangerous Substance Heroin in violation of 63 O.S. Supp. 1976, § 2-401 (A. 4-5).

Petitioner and Jones were tried by jury on April 12 and 13, 1977. Petitioner was represented by the Public Defender's Office of Oklahoma County, Oklahoma, at the trial and initially upon appeal. The State introduced evidence at the trial from an undercover agent to the effect that on October 5, 1976, in what was essentially a single transaction, he acquired one balloon of heroin from petitioner and one balloon of heroin from Jones and paid to Jones a total of $50 for such balloons (R.T. 40-42). On April 13 the jury returned a verdict of quilty as to both petitioner and Jones.

On April 14, 1977, the jury was reconvened to consider the sentencing stage of the trial. Jones was charged under the regular penalty provision of 63 O.S. Supp. 1976, § 2-401, which provided for a punishment of "imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000)." Petitioner, on the other hand, was charged by means of page 2 of his Information (A.6, Supp. R.) with having committed the aforementioned Unlawful Distribution of a Controlled Dangerous Substance Heroin

> after he had been convicted of the following crime punishable by imprisonment in the State Penitentiary: BURGLARY IN THE SECOND DEGREE on the 4th day of June, 1970 in the District Court of Oklahoma County, State of Oklahoma . . .; ASSAULT AND BATTERY WITH A DANGEROUS WEAPON WITH INTENT TO DO BODILY INJURY on the 21st day of October, 1975 in the District Court of Oklahoma County, State of Oklahoma . . .

This Information in effect caused petitioner to be charged under Oklahoma's mandatory sentencing statute for habitual offenders, 21 O.S. Supp. 1977, § 51(B).

The second page of the Information was then read to the jury and petitioner entered "his pleas of not guilty" to that charge (A. 14). Petitioner stipulated that the State's Exhibits Nos. 5 and 6 ("Judgment and Sentence Suspended on Plea of Guilty"[1] to the two prior felony offenses charged in the Information) (R. Exhs. 5 and 6) were authentic records; that the defendants there were represented by counsel; and that they represent final convictions. The petitioner did not stipulate, however, that he was the same individual as the defendants in those prior convictions (A. 15).

Thereafter the State introduced evidence that the petitioner was the same individual as the defendants in those

---

[1] Because these were both suspended sentences, petitioner has not spent any previous time in prison as a result of these two prior convictions. (See the docket entries pertaining to the two previous convictions, which are public records and copies of which have been lodged with the Clerk of this Court.)

prior convictions, and it rested its case against petitioner under 21 O.S. Supp. 1977, § 51(B) (A. 16-19).

The court then read the sentencing instructions to the jury (A. 7-10), which charged, among other things,

> This second portion of the Information is simply the charge upon which the defendant is placed upon trial on this issue and sets forth in a formal way the offense of which the defendant is accused. . . .
>
> You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, *shall be punished* by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.
>
> Under the facts of this case this means that *should you find that this defendant has been twice convicted of felony offenses* and that he committed the present offense within ten years of the completion of both of the previous offenses, *then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.*
>
> Should you find that this defendant had previously been convicted of only one felony offense at the time he committed the present offense, then you shall assess his punishment at imprisonment in the State Penitentiary for a term not less than ten (10) years.
>
> Should you find that this defendant has not been previously convicted of any felony offenses, then you shall assess his punishment at imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00). (Emphasis added.)

On its closing argument on this second stage of the trial, the State time and time again emphasized the mandatory nature of the sentence to be imposed against Hicks:

> It's *mandatory* the Legislature said, as Your Honor read to you in the Instructions. And the Judge sets the law out, I don't and the other attorneys don't.
>
> It is *mandatory* that they get forty years if you find that he has been convicted of two felonies before. (A. 20) (emphasis added).
>
> . . . .
>
> The law says that two previous convictions, then it *shall be* forty years.
>
> And I—*the State doesn't feel that there is really any alternative on it;* because the only evidence that you've heard is two previous convictions, and that's unrefuted. (A. 25) (emphasis added).

The jury, based upon these instructions and closing argument, returned a verdict under the mandatory 21 O.S. Supp. 1977, § 51(B) finding petitioner "guilty of Unlawful Distribution of a Controlled Dangerous Substance, after having been previously convicted of two felony offenses and assess his punishment at imprisonment in the State Penitentiary for a term of forty (40) years." (A. 40).

As to Jones, the jury returned a sentence of five years, which was the lowest sentence they could return against her, even though the State had asked for fifteen years (A. 21, 41).

Of course, because petitioner was charged, tried and convicted under the mandatory habitual criminal statute § 51(B), no presentence report was prepared on him; he had no occasion at the trial to present mitigating circumstances or evidence; and he had no opportunity to plead to either the jury or the court for sentencing leniency in imposing a sentence less than 40 years.[2]

Subsequent to petitioner's trial but before his appeal was heard, the Oklahoma Court of Criminal Appeals ruled that 21 O.S. Supp. 1977, § 51(B) was unconstitutional in an unrelated case. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). On appeal to the Oklahoma Court of Criminal Appeals, petitioner claimed, inter alia, that he was sentenced under an unconstitutional statute and that he was denied a fair trial in violation of his rights under the United States Constitution (A. 50-52; R. Hicks' Brief in the Court of Criminal Appeals, p. 12).

The Oklahoma Court of Criminal Appeals, in an opinion filed on March 8, 1979, agreed that petitioner was sentenced under an unconstitutional statute. However, instead of remanding the matter to the District Court for a new jury trial on sentencing as required by 22 O.S. § 926, the Court of Criminal Appeals chose to support petitioner's sentence under the discretionary provisions of 21

[2] Petitioner's attorney did argue that the State had not proven that petitioner was the same person as the defendants in the earlier convictions, and therefore that he should not receive the mandatory 40-year sentence (A. 28-29). However, the jury specifically found that petitioner did have two prior convictions, so it had no choice but to return a 40-year sentence (A. 40).

O.S. Supp. 1977, § 51(A).[3] The court's entire discussion on this matter is as follows:

> Defendant asserts in his fourth assignment of error that 21 O.S. Supp. 1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in *Thigpen* v. *State,* Okl.Cr., 571 P.2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the range of punishment authorized by the provisions of 21 O.S. Supp. 1977, § 51(A). (A. 58)

Petitioner had no notice that the Court of Criminal Appeals would sentence him under § 51(A) rather than remanding the matter, and there was no hearing held on that sentence. Although § 51(A) is a discretionary statute and requires the sentencing authority to exercise discretion in choosing an appropriate sentence between 10 years and life, the Court of Criminal Appeals exercised this discretion in secret, without the benefit of any presentence report, and without ever having laid eyes on petitioner or giving petitioner any opportunity to be heard or to present any mitigating circumstances.[4] Nor was petitioner's

[3] The reference to § 51(A) is more technically to § 51(A)(1). There are two other subsections under §51(A) but neither of them is relevant to the facts of this case. Because the Oklahoma Court in its opinions simply refers to § 51(A) petitioner will follow that practice in this Brief upon the understanding that this actually refers only to § 51(A)(1).

[4] Because petitioner had no occasion to argue mitigating circumstances at the District Court since he was under a mandatory sentence there, this means that, throughout the entire sentencing process, he has never been afforded any hearing or opportunity to argue that he should be given a less severe sentence.

counsel actually present at any time before the Court of Criminal Appeals because no oral argument was allowed on the appeal. To compound matters, the Court of Criminal Appeals did not offer any explanation to petitioner or make any findings as to why it felt a 40-year sentence under § 51(A) was appropriate for him.

On March 23, 1979, petitioner filed a Petition for Rehearing *Pro Se* (R. Petition for Rehearing), which was denied on April 6, 1979 (A. 61). On June 21, 1979, petitioner filed Writ of Certiorari in the United States Supreme Court, which this Court granted on November 26, 1979.

SUMMARY OF ARGUMENT

I. Petitioner Was Denied Procedural Due Process When the Oklahoma Court of Criminal Appeals Sentenced Him To 40 Years Imprisonment Under the Oklahoma Habitual Criminal Statute 21 O.S. Supp. 1977, § 51(A).

A. *Oklahoma's Failure To Follow Its Own Sentencing Procedures Violated Due Process.* Oklahoma law guarantees criminal defendants the right to be sentenced by a jury. 22 O.S. § 926; *Shanahan v. State,* 354 P.2d 780 (Okl.Cr. 1960). This state-created entitlement to jury sentencing is part of the "law of the land" in Oklahoma and its observance by the Oklahoma courts is thus mandated under the Fourteenth Amendment. *Hopt v. Utah,* 110 U.S. 574; *Paul v. Davis,* 424 U.S. 693, 710-711; *Walker v. Sauvinet,* 2 Otto 93, 92 U.S. 90. When the Oklahoma Court of Criminal Appeals disregarded this law

by sentencing petitioner itself under a new section of the Habitual Criminal Statute after declaring unconstitutional a different section of the same law under which petitioner had been sentenced below, petitioner suffered grievous injury in that he was denied his state-guaranteed right to be sentenced by jury. *Klimas v. Mabry,* 599 F.2d 842. This violated due process of law.

B. *Petitioner Was Denied Due Process of Law When He Was Resentenced by the Court of Criminal Appeals Without Notice, Hearing, or an Opportunity to Present Mitigating Circumstances.* Minimal standards of due process require some kind of prior notice and hearing any time a person's liberty is threatened. *Gardner v. Florida,* 430 U.S. 349; *Mempa v. Rhay,* 389 U.S. 128; *cf. Goldberg v. Kelly,* 397 U.S. 254; *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306. Minimal due process, therefore, requires that a convicted person facing discretionary sentencing be allowed notice and a hearing at which to present evidence in mitigation of sentence. *Specht v. Patterson,* 386 U.S. 605; *Morrissey v. Brewer,* 408 U.S. 471. Petitioner was denied this minimal due process protection when he was resentenced without notice, hearing, or the opportunity to present mitigating evidence.

C. *Petitioner Was Denied Due Process Because He Was Sentenced Under a Statute Permitting Wide Discretion Without Any Standards to Direct That Discretion.* Due Process requires that discretionary sentencing be conducted in accordance with meaningful sentencing standards. *Gregg v. Georgia,* 428 U.S. 153; *Giaccio v. Pennsylvania,* 382 U.S. 399; *Rogers v. Britton,* 476 F. Supp.

1036 (E.D. Ark. 1979). The absence of such standards in 21 O.S. Supp. 1977, § 51(A), under which petitioner was resentenced, created a real danger of arbitrary or even vindictive sentencing on the part of the Oklahoma Court of Criminal Appeals. In allowing standardless sentencing under a statute permitting a range from 10 years to life imprisonment, the Oklahoma Legislature has abrogated its responsibility to set sentencing standards—thereby leaving petitioner's liberty subject to a government of men, not of laws.

D. *Petitioner Was Denied Due Process When the Appellate Court Failed to Give Any Reasons Explaining Why It Imposed a 40-Year Sentence on Petitioner.* Due process requires that a sentencing court set forth a simple and brief statement of reasons for each sentence imposed. *Morrissey v. Brewer,* 408 U.S. 471; *Specht v. Patterson,* 386 U.S. 605; *North Carolina v. Pearce,* 395 U.S. 711. This type of statement is necessary for effective appellate review; it is necessary to minimize the risk that the sentencing court will issue its sentence upon an erroneous or inadequate basis; and it would contribute to the legitimacy of sentencing decisions and the rehabilitation of the defendant. *Mathews v. Eldridge,* 424 U.S. 319; *Morrissey v. Brewer,* 408 U.S. 471; *Specht v. Patterson,* 386 U.S. 605.

E. *Petitioner's Due Process Rights Were Violated When His Sentence Was Affirmed and Reissued on the Basis of a Different Statute Than the One Relied Upon Below.* Petitioner was originally sentenced under § 51(B). On appeal the Oklahoma Court of Criminal Appeals held § 51(B) unconstitutional but nevertheless affirmed petitioner's sentence by imposing the same sentence against him under § 51(A), notwithstanding the fact that petitioner was not sentenced below under § 51(A). *Presnell v. Georgia,* 439 U.S. 14; *Cole v. Arkansas,* 333 U.S. 196; *Dunn v. United States,* 47 U.S.L.W. 4607 (June 4, 1979).

II. It Was Cruel and Unusual Punishment In Violation Of The Eighth Amendment To Sentence Petitioner To 40 Years Imprisonment Under The Oklahoma Habitual Criminal Statute 21 O.S. Supp. 1977 § 51(A).

Petitioner's 40-year sentence is cruel and unusual because it makes no measurable contribution to the acceptable penological goals of rehabilitation, deterrence, isolation and retribution, and thus is nothing more than the "needless imposition of pain and suffering." *Coker v. Georgia,* 433 U.S. 584, 592; *Gregg v. Georgia,* 428 U.S. 153. Specifically, § 51(A) is unconstitutional because it does not require that previous time have been served on the prior felony convictions and because it makes no effort to relate the severity of the punishment to the seriousness of the offense. *Weems v. United States,* 217 U.S. 349; *Robinson v. California,* 370 U.S. 660. Further, petitioner's sentence was cruel and unusual because of the manner in which it was imposed, without notice, hearing, an opportunity to present mitigating circumstances, or any explanation. *Furman v. Georgia,* 408 U.S. 238.

III. Petitioner Was Denied Equal Protection of the Law When He Was Classified Under An Admittedly Unconstitutional Statute, and Then, Based Upon that Classification, He Was Discriminated Against By Being Denied State and Federally Guaranteed Rights.

Petitioner was classified unconstitutionally when he was initially tried and convicted under § 51(B) of the Oklahoma Habitual Criminal Statute. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). The Oklahoma Court of Criminal Appeals recognized that § 51(B) bore no rational relationship to any legitimate state purpose and it struck down that statute as violative of the Fourteenth Amendment. Yet, thereafter the Oklahoma Court of Criminal Appeals continued to use that unconstitutional classification to deny petitioner his state-guaranteed right to jury sentencing and his federal rights to notice and a hearing when it resentenced petitioner under § 51(A) without remanding the case to the District Court for a new jury trial on sentencing as was accorded all other defendants charged initially under § 51(A). This violated petitioner's equal protection rights. It is also argued that petitioner was discriminated against on the basis of a state-created "suspect classification," *Loving v. Virginia,* 388 U.S. 1; *Sugarman v. Dougall,* 413 U.S. 634, and that his "fundamental" rights were violated when the Court of Criminal Appeals sentenced him to 40 years imprisonment. *People v. Olivas,* 17 Cal.3d 236, 551 P.2d 375 (1976); *Bolling v. Manson,* 345 F. Supp. 48 (D. Conn. 1972).

ARGUMENT

I. Petitioner Was Denied Procedural Due Process When The Oklahoma Court Of Criminal Appeals Sentenced Him To 40 Years Imprisonment Under The Oklahoma Habitual Criminal Statute 21 O.S. Supp. 1977, § 51(A).

A. The Court of Criminal Appeals Violated Due Process When It Failed to Follow Oklahoma Law Which Entitled Petitioner to be Sentenced by a Jury.

The State of Oklahoma, unlike many other States in the Union, has an express statute and policy entitling defendants to be sentenced by juries rather than judges. 22 O.S. § 926 reads as follows:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

The Oklahoma Court of Criminal Appeals in *Shanahan v. State,* 354 P.2d 780, 784, 786 (1960), has held that the right to be sentenced by a jury is a "sacred right conferred by [Oklahoma] laws," and that jury sentencing may not be dispensed with except upon "voluntary consent or waiver of the accused ..." See *Epperson v. State,* 181 P.2d 292 (Okl.Cr. 1947) (overruled on other grounds, *Fulton v. State,* 491 P.2d 789 (1971)), where the court held that the defendant had to be resentenced by the jury when the in-

itial sentence was found to have been under the wrong section of the habitual sentencing statute.[5]

It should be emphasized at the outset that the Court of Criminal Appeals here did not merely modify an otherwise constitutional sentence. Rather, it declared petitioner's initial sentence and § 51(B) under which it was imposed to be unconstitutional (A. 58). As such, petitioner's initial sentence was void and of no effect. *Brown v. State,* 24 P.2d 1013 (Okla.Cr. 1933); *Karns v. State,* 224 P. 373 (Okla.Cr. 1924); *Ex Parte Lange,* 18 Wall 163, 85 U.S. 872, 879. Thus, when the Court of Criminal Appeals imposed its 40-year sentence on petitioner under § 51(A), it started with a clean slate and relied on an entirely different statute which provided a new basis for sentencing: *i.e.,* a discretionary sentence rather than a mandatory sentence. It became the sentencing entity, and the essential ingredient of sentencing discretion was exercised by it rather than by the jury.[6]

From the time of Magna Carta, the principle that no person should be deprived of life, liberty, or property except by due process of law has been understood to require regular administration, through courts of law, of the "law

[5] The summary manner in which the Court of Criminal Appeals chose to resentence petitioner under a new statute violated Oklahoma procedures in other regards as well. See, *e.g., Ex Parte Lyde,* 191 P. 606 (Okl.Cr. 1920) (holding under Oklahoma law that a defendant has a right to be present in open court when a sentence is imposed against him). See also 22 O.S. Supp. 1979 § 982 as amended by 57 O.S. Supp. § 519 (requiring a presentence report before sentencing).

[6] The jury has been expressly prohibited from exercising any discretion when it initially sentenced petitioner under § 51(B) (A. 9).

of the land," in accordance with those rules and forms which have been established for the protection of private rights.[7] *Murray v. Hoboken,* 18 How. 272, 59 U.S. 372, 374-376; *Ex Parte Kemmler,* 136 U.S. 436.

This Court, long ago, established that "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." *Walker v. Sauvinet,* 2 Otto 93, 92 U.S. 90. Doctrinal evolution in the succeeding 100 years has not affected this fundamental principle. See, *e.g., North Carolina v. Pearce,* 395 U.S. 711, 739 (Black, J., concurring),

> Due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process . . . .

[7] See *Duncan v. Louisiana,* 391 U.S. 145, 169 (Black, J., concurring) ("The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that 'No free man shall be taken, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land.*' . . . [B]y the end of the 14th century 'due process of law' and 'law of the land' were interchangeable. Thus the origin of this clause was an attempt . . . to do away with . . . judicial commissions *with no sure and definite procedural protections* and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial *in accord with the law of the land* that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans . . . the right to be tried by independent and unprejudiced courts *using established procedures and applying valid pre-existing laws.*") (emphasis added.)

One of the clearest declarations by this Court that due process is violated when a state fails to follow its own established criminal procedures is found in the case of *Hopt v. Utah,* 110 U.S. 574, 28 L.Ed. 262. The State of Utah had established a statutory right of defendants to be present during the challenge of jurors for cause. Notwithstanding this statutory right, several jurors were challenged out of the presence of the defendant, and he claimed that that procedure denied him due process of law. This Court, in a unanimous decision, agreed. In language that has often been quoted, the Court said,

> Neither [Life nor liberty] can be lawfully taken *except in the mode prescribed by law. That which the law makes essential in proceedings* involving the deprivation of life or liberty *cannot be dispensed with* or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. . . .*[T]he Legislature has deemed it essential* to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. 28 L.Ed. at 265 (emphasis added).

A case presenting facts that are strikingly similar to petitioner's situation here is *Klimas v. Mabry,* 599 F.2d 842 (8th Cir. 1979). Klimas was convicted by an Arkansas jury of burglary and grand larceny, and in a bifurcated

trial in which Klimas was charged under Arkansas' Habitual Criminal Statute, the jury imposed two consecutive sentences totaling 63 years imprisonment upon a record that showed seven previous felonies in the State of Missouri and six petty burglary offenses in the State of Arkansas. Arkansas, like Oklahoma, gave defendants a statutory right to have this sentence imposed by a jury. Upon appeal, the Arkansas Supreme Court reversed the jury sentence because it was unable to determine whether Klimas had been represented by counsel in the Missouri convictions. However, it found the Arkansas convictions not suspect, and concluded that it could impose a new sentence upon Klimas of 42 years under the habitual criminal statute based upon the Missouri convictions, without the necessity of remanding the case for a new jury sentence. Upon a habeas corpus proceeding, the Eight Circuit Court of Appeals concluded in a unanimous opinion that Klimas' due process rights were violated when he was denied his statutory right to be resentenced by a jury. The court concluded,

> Where a state has provided, by statute, that a habitual criminal charge is to be tried to a jury, we do not believe that the state can abrogate that right in a particular case without violating the notions of fundamental fairness inherent in the due process clause. Where a right to trial by jury has been established under state law, the state cannot deny a particular accused that right without violating even the minimal standards of the due process clause. *Id.* at 848.

This is not to say that every trivial deviation from state criminal procedure will constitute a violation of due

process. See *Buchalter v. New York,* 319 U.S. 427. However, if the disregarded procedure has substantive content and if it could have altered or modified the resulting conviction or sentence, then there can be no doubt that the failure of the state to follow such procedure violates due process. *Hill v. United States,* 368 U.S. 424, 429; *Id.* at 430-435 (Black, J., dissenting); *Klimas v. Mabry, supra.*

It is clear beyond peradventure that in the State of Oklahoma the right to be sentenced by a jury is far more than a *de minimis* procedural ritual. The Oklahoma Court of Criminal Appeals in *Shanahan v. State,* 354 P.2d 780, 784 (Okl.Cr. 1960), has described the right this way,

> Under our system of jurisprudence this is a *sacred right* conferred by our laws and constitutes a right of which a defendant may not be deprived in absence of waiver.

cf., Duncan v. Louisiana, 391 U.S. 145. Nor can it be denied that the sentencing outcome might have been different in this case had petitioner been accorded his right to be sentenced by a jury. Under § 51(A), the petitioner could have received a sentence of as little as 10 years. Instead, the Court of Criminal Appeals imposed a 40-year sentence upon him. How severe would the sentence have been had it been imposed by the jury? Although the State of Oklahoma has prevented us from answering this question when it failed to follow its own procedures, we do know that the jury sentenced petitioner's codefendant to the *absolute minimum sentence permissible* for commission of the very same substantive offense charged against petitioner.[8] Thus, even if it were proper to resentence petitioner under § 51(A) (a point which is challenged later on in this brief), it may have cost petitioner 30 years of freedom because the State of Oklahoma failed to follow its own procedures.

Another way of analyzing petitioner's claim that leads to the same result is to recognize that under Oklahoma law petitioner has received an "entitlement" or right that his liberty not be taken from him except upon a sentence imposed by jury. Depriving petitioner of this liberty entitlement is a violation of due process.

There can no longer be any doubt that state law may confer rights and privileges which, once granted, may not be denied or withheld without violation due process. *Paul v. Davis,* 424 U.S. 693, 710-711,

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been *initially recognized and protected by state law,* and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. (Emphasis added.)

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[8] Because petitioner's codefendant was not charged as an habitual criminal, the range of her permissible punishment was from 5 to 20 years. 63 O.S. § 2-401. The jury returned a 5-year sentenance (A. 41).

Goss v. Lopez, 419 U.S. 565, 573 ("Here, *on the basis of state law,* appellees plainly had legitimate claims of entitlement to a public education." (emphasis added)); *Bell v. Burson,* 402 U.S. 535, 541 ("Since the *statutory scheme* makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." (emphasis added)); *Morrissey v. Brewer,* 408 U.S. 471 (parole rights); *Goldberg v. Kelly,* 397 U.S. 254 (Welfare rights); *Wolff v. McDonnell,* 418 U.S. 539 (good time credit rights).

Few, if any, of the rights listed in the preceding paragraph had their initial origins in the Constitution. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577. The same may be said of petitioner's right to be sentenced by jury. Although there may be no right under the United States Constitution to be sentenced by a jury, there clearly is such a right for petitioner emanating from Oklahoma law. 22 O.S. § 926; *Shanahan v. State,* 354 P.2d 780, 784 (Okl.Cr. 1960). And, there can be no doubt that state created entitlements relating to sentencing procedures or to the term of incarceration are clearly protected as "liberty" interests under the due process clause of the United States Constitution. *Morrissey v. Brewer,* 408 U.S. 471; *Wolff v. McDonnell,* 418 U.S. 539; *Gagnon v. Scarpelli,* 411 U.S. 778; *Specht v. Patterson,* 386 U.S. 605; *North Carolina v. Pearce,* 395 U.S. 711; *United States v. Tucker,* 404 U.S. 443; *Gardner v. Florida,* 430 U.S. 349.

It may be conceded that not every deprivation of a liberty entitlement need rise to the level of constitutional protection. Certain entitlements may be so devoid of substance that constitutional protection is not required because the entitlement is *"de minimis"* or "trivial." *Cf. Goss v. Lopez,* 419 U.S. 565, 576, 580. A stricter test would ask whether the deprivation of the liberty entitlement results in a "grievous loss." *Morrissey v. Brewer,* 408 U.S. 471, 481; *Wolff v. McDonnell,* 418 U.S. 539, 560. Still other articulations ask whether the interest is an "important" one, *Bell v. Burson,* 402 U.S. 535, 539, or "significant," *Boddie v. Connecticut,* 401 U.S. 371, 379.

It matters not which of these tests is used, because petitioner passes them all with room to spare. As stated previously, jury sentencing in Oklahoma is regarded as a "sacred right." *Shanahan v. State,* 354 P.2d 780, 784 (Okl.Cr. 1960). Jury sentencing is substantively quite different from sentencing by a judge, and the jury process of exercising its collective discretion to find an appropriate sentence is likely to focus on and emphasize factors differently than would a judge. *Klimas v. Mabry,* 599 F.2d 842 (8th Cir. 1979); *Duncan v. Louisiana,* 391 U.S. 145. Petitioner is "entitled" to an opportunity to try to persuade a jury, as his codefendant successfully did, to return a minimum sentence against him. This "entitlement" could be worth 30 years of his liberty. To be denied this

opportunity is far more than a *"de minimis"* loss; it is a "grievous loss" of an "important" and "significant" liberty interest. As such, petitioner was denied due process of law.

B. The Court of Criminal Appeals Violated Due Process When It Imposed a New 40-Year Discretionary Sentence Against Petitioner Without Giving Him Notice, a Hearing, or an Opportunity to Present Mitigating Evidence.

Petitioner was originally sentenced under § 51(B), which required a mandatory 40-year sentence (A. 9, 40). On appeal, the Oklahoma Court of Criminal Appeals held that § 51(B) was unconstitutional (A. 58). As such, the original sentence against petitioner was void and of no effect. *Brown v. State,* 24 P.2d 1013 (Okl.Cr. 1933); *Karns v. State,* 224 P. 373 (Okl.Cr. 1924); *Ex Parte Lange,* 18 Wall 163, 85 U.S. 872, 879; *Coleman v. United States,* 357 F.2d 563 (D.C. Cir. 1965). The Court of Criminal Appeals then concluded that petitioner should be sentenced under § 51(A), which allows a discretionary sentence to be imposed from 10 years to life imprisonment (A. 58).

Rather than remanding the matter for a new sentencing proceeding before a jury, the Court of Criminal Appeals apparently decided it would be more expedient to short-cut the process by simply resentencing petitioner under § 51(A) to the same 40-year term (A.58).

The first time that petitioner learned he was to be sentenced under a discretionary statute was when he read the opinion of the Court of Criminal Appeals. This action by the Court of Criminal Appeals was taken against petitioner without any warning whatever, without hearing or

notice, and without giving petitioner any opportunity to present mitigating evidence or to argue for sentencing leniency.

It is petitioner's contention that this procedure denied him due process of law.

This analysis begins with the two-step process articulated in *Ingraham v. Wright,* 430 U.S. 651, 672,

> The Fourteenth Amendment prohibits any State deprivation of life, liberty or property without due process of law. Application of this prohibition requires the familiar two-stage analysis: we must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; if protected interests are implicated, we then must decide what procedures constitute "due process of law." *Morrissey v. Brewer,* 408 U.S. at 481 . . .; *Board of Regents v. Roth,* 408 U.S. 564, 569-572 . . . .

This Court has often said that a defendant's liberty interest in receiving a proper sentence qualifies as protected under the Due Process Clause of the Fourteenth Amendment. See *Gardner v. Florida,* 430 U.S. 349, 358 ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.")[9]

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[9] Although *Gardner* was a capital punishment case, the quoted language appears to describe the developing law of sentencing in general and not restricted to capital punishment sentencing. This conclusion is buttressed by the fact that the Court cited several noncapital punishment cases in support of this conclusion.

Lest there be any doubt about this, however, reference may be made to other cases where this Court explicitly, or implicitly, has held that the defendant has a protected liberty interest at the sentencing stage of a trial sufficient to invoke constitutional safeguards. *Mempa v. Rhay,* 389 U.S. 128; *Townsend v. Burke,* 334 U.S. 736; *Chandler v. Fretag,* 348 U.S. 3.

When sentencing is performed under a habitual criminal statute, this liberty interest is even more clearly constitutionally protected. *Chewning v. Cunningham,* 368 U.S. 443, 445; *Specht v. Patterson,* 386 U.S. 605, 609-610; *Oyler v. Boles,* 368 U.S. 448, 452.

Indeed, even after the sentencing process is completed, defendants continue to have a protected liberty interest in making sure that their sentences are administered against them fairly. *Morrissey v. Brewer,* 408 U.S. 471, 480-482; *Wolff v. McDonnell,* 418 U.S. 539, 557-558; *Gagnon v. Scarpelli,* 411 U.S. 778, 781-782.

Here, of course, petitioner has been ordered incarcerated behind bars for the next 40 years of his life. Under anyone's definition of "liberty" this would qualify as a protected interest under the Due Process Clause. Petitioner has a liberty interest in being sentenced to the shortest term possible under § 51(A).[10] Or, stated differently, his liberty interest is in being allowed his full range of procedural rights, including a hearing before the proper sentencing authorities, so that he can present mitigating evidence and argue that the sentencing discretion under § 51(A) should be exercised leniently toward him.

[10] Later in this brief, petitioner challenges the constitutionality of any sentencing under § 51(A) and he argues that he should be resentenced instead under 63 O.S. § 2-401. However, that statute also allows for discretionary sentencing (within a range of 5 to 20 years) and petitioner would have the same liberty interest there to be able to utilize the full procedures to which he is entitled under the due process clause to try to persuade the sentencing authority to issue a lenient sentence.

When the Court of Criminal Appeals resentenced petitioner to 40 years under § 51(A) without notice or hearing and without allowing him any opportunity to plresent mitigating evidence, it deprived him of any chance or opportunity that he might have had to show that, under all the circumstances, a proper exercise of discretion would lead to the imposition of a minimum 10-year sentence. This chance or opportunity is potentially worth 30 years of petitioner's liberty.

Since it is clear that we are dealing with a protected liberty interest, the question that remains then is, what due process procedures are required in the context of imposition of a discretionary sentence? The precise nature of the due process protection depends, of course, upon the nature of the interest involved and the nature of the proceeding. *Boddie v. Connecticut,* 401 U.S. 371, 378. So now we turn to the nature of the proceeding.

It may be conceded at the outset that the sentencing stage of a trial is different from the stage that determines guilt or innocence. Modern penology has emphasized the need to look at the offender and not just the offense in order to determine an appropriate sentence. *Woodson v. North Carolina,* 428 U.S. 280, 304; *Pennsylvania ex rel Sullivan v. Ashe,* 302 U.S. 51, 55. This greater breadth of

inquiry at sentencing has been used to justify the withholding of certain rights that are normally guaranteed at the trial on guilt or innocence when such rights would otherwise restrict the Court's scope of inquiry. *Williams v. New York,* 337 U.S. 241 (The Court may rely on a presentence report in sentencing even though it contains hearsay evidence and even though the defendant cannot adequately confront or cross-examine on the statements contained therein.)

However, to the extent that a defendant's due process rights have been relaxed at sentencing it has been to allow a *greater* scope of inquiry; it has not been used to *restrict* the scope of inquiry. Yet if a defendant is not allowed a hearing and a chance to present his side of the story on sentencing, the court will be doing just that. The deck will be stacked against petitioner so that, through presentencing reports or otherwise, absent and disinterested third parties can say all the bad things they want about the defendant's background and personality, while the most interested party of all—the defendant himself—has no chance to make a showing, on his own behalf, of either mitigating circumstances or other aspects of his life and personality that merit sympathetic consideration in the discretionary mix. As the United States Court of Appeals for the District of Columbia said in *Coleman v. United States,* 357 F.2d 563, 571, with reference to sentencing discretion under a District of Columbia death penalty statute,

> It is a sole discretion to "consider circumstances in mitigation and in aggravation," and to make his determination upon such consideration. It is not a discretion to fail to consider circumstances in mitigation . . .

Although the extent of due process rights may wax and wane with the nature of the proceeding, there are certain "minimum" or fundamental" due process rights that must always be recognized whenever a protected liberty interest is jeopardized. These basic rights include a hearing, and for a hearing to be meaningful rather than a sham, there must also be notice and a right to present evidence and argument before the decision-making body. This due process right to a meaningful hearing has been recognized as a "minimum" or "fundamental" right so often and in so many diverse contexts (many involving protected interests much less important than the liberty interest at stake here upon sentencing) that this proposition can no longer be open to serious doubt: *Goss v. Lopez,* 419 U.S. 565, 579,

> "[M]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that *at a minimum* they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." (emphasis added.)

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 150, 162 (Frankfurter, J., concurring).

> "One of [The *fundamental*] principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, . . ." "[I]t must give

them an opportunity to be heard respecting the justice of the judgment sought." (emphasis added.)

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314,

> "The *fundamental* requisite of due process of law is the opportunity to be heard." . . . This right to be heard has little reality or worth unless one is informed that the matter is pending . . . .
>
> . . . .
>
> An *elementary and fundamental* requirement of due process . . . is notice . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (emphasis added.)

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681,

> Our present concern is solely with the question whether the plaintiff has been accorded due process in *the primary sense,*—whether it has had an opportunity to present its case and be heard in its support. (emphasis added.)

Goldberg v. Kelly, 397 U.S. 254, 267,

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394. . . . In the present context [termination of welfare benefits] these principles require that a recipient have timely and adequate notice . . . and an effective opportunity to defend . . . by presenting his own arguments and evidence orally.

See also *Perry v. Sindermann*, 408 U.S. 593 (right to hearing before teaching contract may be terminated); *Bell v. Burson*, 402 U.S. 535 (right to hearing before driver's license may be suspended); *Parham v. J.R.*, _____ U.S. _____, 99 S.Ct. 2493 (right to hearing before there may be a civil commitment of a child).[11]

No citation is needed for the proposition that at the guilt stage of a trial a defendant is entitled to notice, a hearing, and an opportunity to present evidence on his own behalf.[12] Similary, after conviction and sentencing has occurred this Court has held that a defendant is entitled to notice, a hearing, and a right to present evidence any time the authorities seek to revoke his parole, probation,

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[11] When an appellate court unexpectedly changes the rules and decides a case upon grounds that were not anticipated at the time the case was tried below, due process requires that the case be remanded to give the parties notice and a new hearing opportunity to present evidence on the new issue. *Saunders v. Shaw*, 244 U.S. 317; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673. This is analogous to petitioner's situation because the Oklahoma Court of Criminal Appeals unexpectedly ruled that § 51(B) was unconstitutional and that petitioner should be sentenced under a new, discretionary statute. However, the Court of Criminal Appeals neither remanded the case for further proceedings below, nor did it call a hearing itself before presuming to exercise its own discretion as to what an appropriate sentence should be.

[12] For many defendants the sentencing stage is *more* important than the quilt stage of the trial. If the evidence of guilt is clear, as it often is, the defendant's best hope is to persuade the sentencing entity to give him a lenient sentence. Thus, allowing him a full hearing before sentencing to present mitigating circumstances and evidence becomes absolutely critical to his liberty interests, and it may be his only realistic opportunity to try to protect his liberty or minimize its loss through sentencing.

or accrued good time credits. *Morrissey v. Brewer,* 408 U.S. 471 at 488-489 (parole revocation),

> [The "minimum requirements of due process"] include
> (a) written notice of the claimed violations of parole;
> (b) disclosure to the parolee of evidence against him;
> (c) opportunity to be heard in person and to present witnesses and documentary evidence . . . .

Wolff v. McDonnell, 418 U.S. 539 at 563, 566 (good time credits),

> ["Minimum requirements of procedural due process" include] advance written notice . . . .
>
> We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing . . . .

Gagnon v. Scarpelli, 411 U.S. 778 at 782, 786 (probation revocation),

> "[M]inimum requirements of due process" include ". . . (a) written notice of the claimed violations of [probation] . . .; (b) disclosure to the [probationer] . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; . . ."

If these rights are constitutionally mandated before portions of an original sentence can be *re*instated, must not at least equal constitutional protections be accorded to the imposition of the sentence in the first instance?

If anything, the original sentencing procedure should accord a defendant more constitutional protections because he is still within the judicial context and, until sentence is actually imposed, no final judgment has been issued against him. *Morrissey v. Brewer,* 408 U.S. 471 at 480. All the judicial mechanisms for factfinding (such as subpoenas and court reporters) are in place. Furthermore, there can be no risk of injury to prison discipline or postsentencing supervision by granting a defendant a full hearing at the sentencing stage of his trial.

It is not sufficient to say that the process of sentencing involves the application of discretion and specialized expertise and therefore no formal hearing is needed. What is the name of discretion when it is exercised in a vacuum without an adequate factual record to support it? Its name is caprice. What is the name of discretion when exercised upon only half a record—the half that the state chooses to bring before the court? Its name is bias. What is the name of specialized expertise that renders judgments which are not preceded by a fair and full factual examination into the question before it? Its name is fiat.

The sentencing process, like any of the other judicial processes, is a symbiotic blend of factfinding and judgment. And the end result is only as strong as its weakest link. The process of finding a defendant guilty requires the finding of certain facts and then the exercise of judgment to weigh those facts to see if the legal standards of guilt are satisfied. Similarly, with the process of parole or proba-

tion revocation, the factfinder must determine factually whether the conditions of parole or probation have been violated, and then he must exercise predictive judgment to determine whether the situation merits revocation of the probation or parole. *Morrissey v. Brewer,* 408 U.S. 471, 479-480. Is sentencing any different? The sentencing authority makes factual findings about the circumstances of the crime, the defendant's background, and his motivation, and then applies discretion to decide an "appropriate" sentence within the parameters set by the state. See *United States ex rel Collins v. Claudy,* 204 F.2d 624, 628 (3d Cir. 1953):

> [A sentencing hearing under a recidivist statute] serves two important purposes. It is as essential to the establishment of a legal basis for any enhanced sentence as proof of premeditation is in many states for capital punishment for murder. . . . At the same time *it also enables the court to employ informed judgment in the exercise of its far reaching discretion* whether to impose additional punishment, and how much, on account of such prior conviction and attendant circumstances as the inquiry may reveal. *Essential fairness dictates that the disposition of any issue* thus determinative of the legal power of the tribunal and *thereafter influential upon its discretion to punish a defendant* must be after some notice to the accused that the issue is before the court followed by an opportunity to be heard. (emphasis added.)

Kent v. United States, 383 U.S. 541, 553-554; *Morrissey v. Brewer,* 408 U.S. 471, 484.

In *Gardner v. Florida,* 430 U.S. 349, 362, this Court

held that due process required that the defendant be notified of the contents of the presentence report and given an opportunity to deny or explain the allegations contained therein before sentencing. In *Mempa v. Rhay,* 389 U.S. 128, the Court held that the defendant was entitled to counsel at sentencing. Obviously, the right to counsel would be a hollow right if it does not also contemplate notice, hearing, and an opportunity to present mitigating circumstances to the sentencing court.

When sentencing is under an habitual criminal statute, this Court has been even more expansive in recognizing due process rights at the sentencing stage. In *Specht v. Patterson,* 386 U.S. 605, 609-610, the Court reviewed the sentencing procedures under the Colorado Sex Offenders Act, which it likened to recidivist statute sentencing. The Court quoted with approval a statement from *Gerchman v. Maroney,* 355 F.2d 302, 312, in stating what due process rights were available to the defendant upon sentencing,

> "Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. . . ."
>
> Due process, in other words, requires that he be presented with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.

See also *Chewning v. Cunningham,* 368 U.S. 443, and *Chandler v. Fretag,* 348 U.S. 3, which held that the defendant was entitled to counsel at the habitual criminal sentencing stage of the trial. As noted above, right to counsel would be meaningless if it did not subsume the right to notice, hearing, and an opportunity to present evidence and argument.

The cost to the state to assure each defendant an evidentiary hearing would not be great. In most cases it could be expected that the hearing would involve little more than an opportunity for the defendant to tell his own story. But in other cases there may be important additional evidence that the defendant would like to bring before the court which was not relevant at the hearing stage.

The benefits, on the other hand, would be great in terms of encouraging rehabilitation, *Morrissey v. Brewer,* 408 U.S. 471, 484; *Greenholtz v. Inmates,* _____ U.S. _____, 99 S.Ct.Rptr. 2100, 2117-2118 (Marshall dissenting in part); and in terms of preserving the appearance as well as the reality of fair, considered treatment of defendants. See *Kent v. United States,* 383 U.S. 541, 554,

> [B]ut there is no place in our system of law for reaching a result of such tremendous consequences without ceremony--without hearing, without effective assistance of counsel, without a statement of reasons.

See also *Morrissey v. Brewer,* 408 U.S. 471, 499 (Douglas, J., dissenting in part).

> The rule of law is important in the stability of society . . . "Notice and opportunity for hearing appropriate to the nature of the case," . . . are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men.

The petitioner here is asking for the right to present evidence of mitigating circumstances and to be able to argue to the sentencing authorities that he should be given leniency under § 51(A). He has not yet had this opportunity, and the discretion that has been exercised against him by the Court of Criminal Appeals has therefore been exercised on an incomplete record and without adequate factual basis. In all of this, the petitioner has been denied his due process of law.

C. The Court of Criminal Appeals Violated Due Process When It Sentenced Petitioner to 40 Years Imprisonment Under a Statute That Allowed Wide Sentencing Discretion But Provided No Meaningful Standards to Guide That Discretion.

The time has come for this Court to rule unequivocally that in a noncapital case, as well as in capital cases, sentencing legislation must contain meaningful sentencing standards for the trial court or jury to follow when it allows wide latitude in sentencing discretion.

So that the facts relevant to this argument are clearly in mind, several of them should be restated: (1) §51(A)(1), under which petitioner was resentenced by the Oklahoma Court of Criminal Appeals (A. 58). That statute authorizes the imposition of any sentence ranging from

ten years to life imprisonment.[13] Excluding capital punishment which could not constitutionally be imposed in any event for a single sale of heroin, cf. *Coker v. Georgia,* 433 U.S. 584, that leaves practically the entire range of sentencing options to the discretion of the court or jury; (2) no standards or guidance are set forth in § 51(A) to assist the judge or jury in deciding whether a particular defendant merits a light, moderate or heavy sentence under this statute; (3) two successive juries or the same judge in two successive cases could, within the "limits" set in § 51(A), impose a life term for a person convicted of two separate charges of passing bad checks in separate face amounts of $21 apiece,[14] and then sentence the next defendant to 10 years imprisonment for first degree manslaughter, second degree rape, or robbery with a dangerous weapon even though he may have had dozens of prior felony convictions;[15] (4) the Oklahoma Court of Criminal Appeals, in imposing sentence under § 51(A), was not required to state any reasons why it chose the punishment that it did, and no such reasoning was ever given.

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[13] 21 O.S. Supp. 1977, § 51(A)(1) [hereinafter "§ 51(A)"] reads as follows:

> Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefore as follows: (1) If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

[14] See 21 O.S. Supp. 1979 § 1541.2.

[15] See 21 O.S. §§ 715, 1116, 801.

Lacking any statutory standards or judicial findings, the petitioner in this case is left wondering whether his 40-year sentence was arbitrary and capricious or whether it had some basis in fact or legislative policy. The statute and the court both stand mute before his inquiry. We know that the Court of Criminal Appeals could not have based its sentencing discretion on the prior jury sentence because the jury had been given no discretion whatever to pick an appropriate sentence for petitioner. It was instructed that the 40-year term was mandatory (A. 9).[16] And this sentence had been stricken, in any event, as unconstitutional (A. 58). We know that the Court of Criminal Appeals could not have based its sentencing discretion upon a subjective evaluation of the petitioner and his need for incarceration, because it had no presentence report, it gave petitioner no hearing or other opportunity to present any mitigating circumstances, and, indeed, it had never even laid eyes on the petitioner.[17] We know also that the Court of Criminal Appeals could not have based its sentencing discretion on an objective determination that conviction for sale of heroin with prior convictions for burglary in the second degree and assault and battery always merits a 40-year sentence, because when the Court of Criminal Appeals was faced with other defendants who committed essentially the same crimes who had also been unconstitu-

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[16] Indeed, when the jury was given discretion it imposed the minimum permissible punishment of 5 years upon petitioner's codefendant for the very same offense (A. 41).

[17] Nor was a presentence report or mitigating evidence introduced below because there petitioner was convicted under a mandatory sentencing statute.

tionally sentenced under § 51(B), it appears generally to have reduced those sentences to terms far shorter than petitioner's term.[18]

Why then was this petitioner sentenced to 40 years imprisonment? Was it because he is black or young or was there something known specially to the court but not revealed to petitioner? (R.T. 38; "Conviction: Summary of Facts"). None of us know. The Legislature gave the court free rein to do with the petitioner whatever it wished.

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[18] See *Garland v. Oklahoma,* No. F-77-728 (the defendant's third offense was the sale of heroin. Prior offenses were burglary in the second degree and *manslaughter* in the second degree. The Court of Criminal Appeals struck down a 40-year sentence under § 51(B), and imposed a discretionary 27-year sentence under § 51(A)); *Sam v. State of Oklahoma,* No. F-77-621 (the third offense was for the sale of cocaine. Previous offenses were both for burglary in the second degree. Once again, the Court of Criminal Appeals reversed a 40-year sentence under § 51(B) and imposed a 25-year discretionary sentence under § 51(A)). Indeed, in most cases known to this petitioner in which the Oklahoma Court of Criminal Appeals has been faced with a sentence imposed under the unconstitutional § 51(B), it has significantly reduced the term in resentencing the defendant under § 51(A). E.g. *Lee v. State of Oklahoma,* 572 P.2d 260. *Exum v. State,* F-77-677 (30 year sentence under § 51(B) reduced to 10 years under § 51(A)); *Van Curen v. State,* F-78-127 (27-year sentence under § 51(B) reduced to 17 years under § 51(A)); *Lambert v. State,* F-77-715 (life sentence plus 20 years under § 51(B) modified to 45 years under § 51(A)); *Myers v. State,* F-77-372 (27-year sentence under § 51(B) modified to 14 years under § 51(A)); *Sutton v. State,* F-77-617 (27-year sentence under § 51(B) modified to 20 years under § 51(A)). Copies of these unpublished opinions are on file with the Clerk of this Court. A reading of these cases can only leave one with the impression that the new sentences imposed by the Court of Criminal Appeals are "freakishly" imposed in an arbitrary and capricious manner.

The court reached its decision in private and issued its fiat without explanation. Whether one agrees with the 40-year sentence or not, no one can deny that this is the naked rule of men, exercised in secret to control essentially the entire remaining life of another human being. It is not the act of a "government of laws" nor is it "ordered liberty." *Marbury v. Madison,* 1 Cranch 137, 163; *Hurtado v. California,* 110 U.S. 516; *Palko v. Connecticut,* 302 U.S. 319; *McGautha v. California,* 402 U.S. 183, 250-252, 254 (Brennan, J., dissenting). *Id.* at p. 296, note 54.

The review of modern opinions by this Court on the need for standards to control sentencing discretion probably can begin with *McGautha v. California,* 402 U.S. 183 (1971). In an opinion by Justice Harlan, joined by four other members of the Court, it was held not to violate due process for a statute to give a jury standardless discretion to decide between imposing the death penalty or life imprisonment upon a defendant convicted of first degree murder. Justice Black concurred, and a vigorous dissent was written by Justice Brennan, joined by Justices Douglas and Marshall, in which it was argued that legislative standards must be imposed to guide the jury's discretion. 402 U.S. at 248.

Several observations should be made about *McGautha.* First, the California statute involved there was limited to a very narrow group of crimes and it authorized only two very specific penalties for the jury to choose between: life imprisonment and death. The Oklahoma statute under which Hicks was sentenced, on the other hand, covers the entire range of felonies within the state (ranging

from writing a bad check for $21 to committing murder), and it allows the jury or sentencing judge discretion among essentially the entire range of permissible penalties short of death itself. Thus, the range of discretion allowed in Oklahoma is considerably broader than the discretion confronted by the Court in *McGautha*.

Second, *McGautha* has either been overruled or strictly limited to its own facts by subsequent decisions of this Court. *Furman v. Georgia,* 408 U.S. 238, 400 (Berger, C.J., dissenting); *Id.* at p. 429, n. 11 (Powell, J., dissenting); *Gregg v. Georgia,* 428 U.S. 153, 195 n. 47.

The next significant case involving sentencing standards was *Furman v. Georgia,* 408 U.S. 238. That case struck down the Texas death penalty statute and it spawned nine separate opinions; five concurring opinions and four dissents. In those opinions, Justices White and Stewart seemed to join the position previously espoused by Justices Brennan, Douglas and Marshall in their dissent in *McGautha v. California,* that standardless jury sentencing in a capital case was unconstitutional.[19] *Furman v. Georgia, Id.* at 306-310 (Stewart, J., concurring); *Id.* at 310-314 (White, J., concurring).

By the time the Court decided *Woodson v. North Carolina,* 428 U.S. at 280, Justices Powell and Stevens had concurred in an opinion by Justice Stewart that there must be specific legislative standards for a jury to follow in determining whether to impose a life or death sentence. *Id.*

[19] In *Furman* the decisions were based upon the Eighth Amendment, whereas in *McGautha* the decision was premised purely upon the due process clause.

at 303. See also *Roberts v. Louisiana,* 428 U.S. 325, 334-335 (Stewart, J.).

The viability of *Furman* as authority requiring that in death penalty cases, at least, there must be clear legislative standards to guide the jury in exercising its discretion grew further in *Gregg v. Georgia,* 428 U.S. 153. In the opinion of the Court, Justice Stewart, joined by Justices Powell and Stevens, wrote,

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Id.,* 428 U.S. at 189.

Mr. Justice White, with whom the Chief Justice and Mr. Justice Rehnquist joined, interpreted the law of *Furman* as follows,

> In *Furman,* this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence was cruel and unusual. *Id.,* 428 U.S. at 220-221.

Thus, it can now be said that the law of the land is that a jury or sentencing judge must receive specific, careful legislative guidelines in order to assist it in its deliberations on whether to impose the death penalty or life imprisonment. The question then is whether the requirement for sentencing standards also exists when the

jury or judge is asked to impose an imprisonment term rather than a death penalty. At first blush, this would seem to be quite an unremarkable extension of the ruling in *Furman, Roberts, Woodson* and *Gregg*. Although those cases had their fundamental underpinning in the Eighth Amendment, they were made applicable to the states through the use of the due process clause of the Fourteenth Amendment. And, at least that portion of those cases that talked about the requirement of sentencing standards was really concerned with the *procedures* utilized in imposing the sentence rather than the inherent nature of the sentence itself. This, of course, is the very essence of the due process clause.

The Fourteenth Amendment to the United States Constitution reads: "nor shall any State deprive any person of *life, liberty,* or property, without due process of law; . . ." (emphasis added). "The Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.' " *Furman v. Georgia,* 408 U.S. 238, 414, 447 (Powell, J., dissenting). It would be a radical departure indeed from the proud traditions of this Court if a rule were to be articulated that the fairness of a defendant's trial and the rigors with which it must comply with procedural due process depend upon the severity of the sentence which he receives. See *Thompson v. Louisville,* 362 U.S. 199, 203.

Indeed, in many noncapital cases, this Court has affirmed the due process requirement of standards for the decision maker before he is empowered to deprive a defendant of life, liberty or property. In *Giaccio v. Pennsylvania,* 382 U.S. 399, this Court struck down as vague and in violation of the due process clause a Pennsylvania statute that allowed a jury to assess costs against either the prosecutor or an acquitted defendant. The statute had no standards to assist the jury in deciding against whom such costs should be assessed or in what proportions. This case is similar to the one now before the Court because in both instances the jury discretion arises under a punishment statute rather than a statute defining a substantive crime. Although several Justices would have decided the case on the issue of whether it was appropriate to assess costs against an acquitted defendant, the majority opinion came down squarely upon the proposition that the statute violated due process because it enabled the jury to assess a penalty (a modest fine) without adequate standards to guide it. Justice Black wrote the Court opinion for seven Justices:

> [T]he 1860 Act is invalid under the Due Process Clause because of vagueness and the *absence of any standards* sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs. *Id.,* 382 U.S. at 402 (emphasis added).
>
> Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an *understandable meaning with legal standards* that

courts must enforce.[20] *Id.*, 382 U.S. at 403 (emphasis added).

Perhaps the closest case on point is *Rogers v. Britton,* 476 F. Supp. 1036 (E.D. Ark. 1979). There, the petitioner brought a habeas corpus proceeding challenging a jury sentence of life imprisonment following his conviction of first degree rape. The challenge was based upon the argument that under the sentencing statute the jury had unlimited discretion to impose a term from 30 years to life imprisonment, and there were no standards given to assist the jury in exercising this discretion. It was alleged that this violated the Eighth and Fourteenth Amendments. The Arkansas District Court agreed, saying,

> The rub is that the jury in this case was given no guidance in making these distinctions. It was left completely at large, . . . The jury simply announced its verdict as to punishment, giving, of course, no reasons, and was then discharged—an ad hoc body whose reasons for imposing the maximum sentence on petitioner can never be known, and whose decision cannot be rationalized even by reference to some set of standards that were presumably applied. For the

[20] At footnote 8, the Court says that it does not intend to cast doubt on the constitutionality of state practice allowing juries to fix punishment "within legally prescribed limits." *Id.* at 405. Of course, Hicks is not arguing that it is unconstitutional to allow juries to set sentences. Nor is he quarreling with the proposition that such sentences must be "within legally prescribed limits." The point that Hicks raises (and *Giaccio* supports) is that there must be "legally prescribed limits." In *Giaccio* there were no such limits and it was vague and unconstitutional as a result. The same conclusion should be reached here.

> legislature has provided no standards. We cannot know, and the jury could not know, what weight, if any, the General Assembly might have assigned to the defendant's youth, the fact that he used a gun, the absence of aggravated injury, the lack of a prior record, or any other aggravating or mitigating circumstances. *Id.*, at 1039.

That court reviewed the death penalty cases and other recent decisions of this Court and concluded that a lengthy imprisonment term is entitled to the same due process protection of standards to protect against arbitrary jury action.

Other noncapital cases where this Court has held that sentencing procedures must satisfy the full panoply of due process rights that are found at any other stage of the criminal trial include *Mempa v. Rhay,* 389 U.S. 128, 137; *Oyler v. Boles,* 368 U.S. 448, 452; *Townsend v. Burke,* 334 U.S. 736, 740-741. Also cf. *Gardner v. Florida,* 430 U.S. 349, 358, which, although a capital case, uses language which appears to apply to noncapital cases as well. In holding that the due process clause guarantees a defendant right to "notice" at the sentencing stage of his trial, this Court is implicitly saying that there must be articulated "standards" against which his sentence is to be measured. It would be a hollow right indeed to give a defendant notice that he is going to have a sentence imposed against him but to refuse to tell him the standards that will be employed in setting the sentence. This would be like telling him that he is about to enter a boxing ring and then blindfolding him once he gets inside the ropes.

One of the most frequently quoted tenets in sentencing law is that the Legislature, not the courts, has the authority for determining the severity of sentences for various crimes: *Gregg v. Georgia,* 428 U.S. 153, 175-176:

> "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." . . . [T]he specification of punishments . . . "are peculiarly questions of legislative policy."

See also *Gore v. United States,* 357 U.S. 386, 393 (1958)

> In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy.

But permitting standardless sentencing by the court or jury under a statute that authorizes a wide range of punishments runs *exactly counter* to this time-honored principle. When the Oklahoma Legislature allowed Hicks to be punished by a term anywhere from 10 years to life without setting any "legislative policy" to guide a judge or jury in deciding where within this almost total range to set the penalty, it played practically no role whatsoever in determining the actual punishment that Hicks or others similarly situated should receive for their crimes. In reality, the Oklahoma Legislature has abdicated its responsibility and has delegated total responsibility for establishing sentencing policy to the courts. Worse, because that policy is then set on an ad hoc basis and it is

rarely explained in the State of Oklahoma, it is a completely unknowable, ever changing and totally arbitrary policy. In Oklahoma, the defendants' liberty is subject to a government of men, not laws.[21]

The Court's attention is also directed to its post-sentencing cases: *Wolff v. McDonnell,* 418 U.S. 539 (White, J.); *Gagnon v. Scarpelli,* 411 U.S. 778 (Powell, J.); *Morrissey v. Brewer,* 408 U.S. 471 (Burger, C.J.). Each of those cases commanded unanimous support from this Court that when a defendant's parole or probation is revoked or when he loses accrued good time, he is entitled to certain fundamental due process rights, including (1) notice, (2) disclosure of evidence against him, (3) opportunity to be heard and present witnesses, and (4) a statement of the evidence relied upon and reasons for action taken. These due process rights all subsume the right to have knowable, meaningful standards upon which the discretionary judgment of the Parole Board or prison authorities will be exercised. Without knowledge of the standards and basis upon which the judgment will be made to revoke parole, probation or good time, the other rights listed would be totally ineffective. Although it is true that

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[21] This Court has also held that it will not typically review sentencing discretion as long as it is within the authorized statutory limits. But it will review the *process* by which a sentence was determined. *Dorszynski v. United States,* 418 U.S. 424, 443, and it may reach any sentence reached in error. *Coleman v. United States,* 357 F.2d 563, 570 (D.C. Cir. 1965). How is this Court to know what process was used to reach a sentence and how is this Court to know if the sentence was based upon error if the sentence may be determined in secret and presented without explanation?

these cases speak to when parole, probation or good time is revoked, it would make no sense whatever constitutionally to guarantee a defendant greater rights upon the reinstatement of his sentence than when the sentence is imposed in the first instance. *Morrissey v. Brewer, supra,* 408 U.S. at 480; *Wolff v. McDonnell, supra,* 418 U.S. at 555, 557; *Gagnon v. Scarpelli, supra,* 411 U.S. at 781.[22]

In the case of *Mathews v. Eldridge,* 424 U.S. 319, 335, this Court articulated a three-stage test to determine whether governmental procedures violated the due process clause. First, there must be an analysis of "the private interest that will be affected by the official action." Here the private interest of Hicks that is affected by the official action of sentencing is his liberty interest—to the extent of 40 years of his life. Surely, this is one of the most fundamental interests recognized in the United States Constitution. *Morrissey v. Brewer,* 408 U.S. 471, 482.

Second, there must be an analysis of the "risk of an erroneous deprivation of such interest through the procedures used." Without clear standards to guide the judge or jury in sentencing, there are enormous risks that petitioner and other defendants will be erroneously deprived

[22] Even in matters involving property rights, which surely cannot rise to any higher level of protection than "liberty" rights under the due process clause, this Court has often required articulated standards to govern the discretionary power of the decision-making entity. In *Goldberg v. Kelly,* 397 U.S. 254, this Court required that New York City provide advance notice of the "reasons for the proposed termination" of the welfare payments, *Id.,* 397 U.S. at 267-268. Cf. *Yick Wo v. Hopkins,* 118 U.S. 356, 30 L.Ed. 220, 225-226.

of their liberty. The judge or jury may rely on erroneous factors or simply give way to passion or prejudice. And, without standards, there can be no meaningful appellate review of the action taken by the sentencing authority. Careful instructions and detailed standards are required in the guilt-fixing stage of the trial for these very reasons. Why is the sentencing stage any different? Often where guilt is clear the sentencing stage is actually the more important stage insofar as the defendant is concerned.

Finally, there must be an analysis of the additional "fiscal and administrative burdens" if further procedural rights are imposed. This Court has already required clear standards to guide discretion in imposing the death penalty, and that has not seemed to impose any undue hardship upon the states. It would seem to be no more difficult to require the same kind of standards to control judge or jury discretion in deciding upon a prison term. Certain mitigating or aggravating factors could be listed to justify a sentence near the top or bottom ranges of the allowable punishment when the range is large. Alternatively, if the range of punishment were narrowed, the sentencing discretion might be sufficiently fettered that no further articulated standards would be required. This petitioner would not presume to write such legislation for the State of Oklahoma. But he does ask this Court to say that some greater guide or control on sentencing discretion is needed than is found in 21 O.S. Supp. 1977, § 51(A)—to wit, a range of 10 years to life without any standards whatsoever. That statute should be struck down as unconstitu-

tional in violation of the due process clause of the Fourteenth Amendment.

D. The Court of Criminal Appeals Violated Due Process When It Failed To Offer Any Rationale or Basis For the Sentence That It Imposed Against Petitioner.[23]

This Court has often held that where important constitutional rights are involved, due process requires the establishment of procedures adequate to permit appellate review of the process affecting such rights. See *McGautha v. California,* 402 U.S. 183 at 256 (Brennan, J., dissenting),

> [W]here federally protected rights are involved, due process commands not only that state procedure be adequate to assure a fair hearing of federal claims, . . .but also that it provide adequate opportunity for review of those federal claims where such review is otherwise available.

See also *Gregg v. Georgia,* 428 U.S. 153, 195; *Boykin v. Alabama,* 395 U.S. 238, 242-244; *Jackson v. Denno,* 378 U.S. 368, 387; *Goldberg v. Kelly,* 397 U.S. 254, 271; *Garner v. Louisiana,* 368 U.S. 157, 173.

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[23] This brief does not address whether juries should also be required to set forth reasons for the sentences they impose because petitioner here was ultimately sentenced by a court, rather than a jury. Furthermore, there may be valid reasons not to extend this rule to juries because of the greater difficulty that juries may have in articulating their collective reasoning. Additionally, the fact that they are a collective body and reflect community standards provides some independent assurance to a defendant that his sentence is not based upon the arbitrariness or capriciousness of a single individual. *Duncan v. Louisiana,* 391 U.S. 145, 158.

Specifically applying this requirement to sentencing procedures, this Court has unanimously held that the court must issue findings adequate to make meaningful any appeal that is allowed. See *Specht v. Patterson*, 386 U.S. 605, where this Court ruled unconstitutional a one-day to life sentence imposed under the Colorado Sex Offenders Act because due process was not followed in the separate sentencing procedures.

> Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. *The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue".* . . . Due process . . . requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. *And there must be findings adequate to make meaningful any appeal that is allowed. Id.* at 610 (emphasis added).

In a great many other contexts as well, where the defendant's rights are less well protected than they are in the sentencing stage of a trial, the Court has frequently affirmed the need for a written explanation justifying the punishment imposed upon the defendant. See *Morrissey v. Brewer,* 408 U.S. 471 at 489 (Berger, C.J.) ("[Minimum requirements of due process include] (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole."); *Gagnon v. Scarpelli,* 411 U.S. 778 at 786 (Powell J.); *Wolff v. McDonnell,* 418 U.S. 539, 563 (White, J.) ("[Minimum requirements of pro-

cedural due process require] . . . a written statement of the factfindings as to the evidence relied upon and the reasons for the disciplinary action taken [in reducing good time credits].") If "minimum requirements of procedural due process" require a written statement of the evidence and reasons relied upon in reinstating a criminal sentence, then *a fortiori,* it seems that a similar statement of evidence and reasoning relied upon should be required when such sentence was initially imposed. See also *United States v. Ammidown,* 497 F.2d 615 (D.C. Cir. 1973) (trial judge was required to state his reasons for rejecting a plea bargained by the defendant and the prosecutor so that Appellate Court could review that rejection for abuse of discretion); *Goldberg v. Kelly,* 397 U.S. 254 at 271.

Similarly, in *North Carolina v. Pearce,* 395 U.S. 711, this Court held that "In order to assure the absence of such a motivation [of vindictiveness against the defendant because of his appeal], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. . . . And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, 395 U.S. at 726.

There is a risk of constitutional error in almost every sentence. Sometimes that constitutional error is vindictiveness or prejudice; other times it is failure to follow the proper law; other times it is reliance upon innaccurate factual information by the sentencing authority. If written

reasoning is needed to help guard against vindictiveness, it is equally needed to guard against the other kinds of constitutional errors that can creep into the sentencing process.

In fact, the annals of this Court's opinions and the opinions of lower appellate courts are replete with occasions of error in the sentencing process which were detected only by happenstance when the sentencing judge volunteered reasons and opinions for his sentence. *E.g.: United States v. Tucker,* 404 U.S. 443 (judge relied upon prior convictions which had been unconstitutionally secured without the benefit of counsel); *Townsend v. Burke,* 334 U.S. 736 (judge made facetious comments and relied upon inaccurate information as to the defendant's background); *Gardner v. Florida,* 430 U.S. 349 (judge relied upon a presentence report which he failed to show to the defendant or his counsel);[24] *United States v. Lewis,* 392 F.2d 440 (4th Cir. 1968) (judge based sentence upon an erroneous belief that he had to impose the maximum sentence authorized under the statute, whereas in reality he had discretion to impose a lesser sentence); *Coleman v. United States,* 357 F.2d 563 (D.C. Cir. 1965) (judge applied the wrong burden of proof); *Scott v. United States,* 419 F.2d 264 (D.C. Cir. 1969) (judge admitted prejudice against defendants who maintained their innocence after

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[24] If a presentence report must be made part of the appellate record so that the appellate court can review whether the trial court accurately exercised its sentencing discretion, would not a requirement of a written reasoned opinion explaining the sentence be of ever so much more value to an appellate court in safeguarding the defendant's constitutional rights?

conviction). In every one of these cases, it was purely fortuitous that the constitutional error was caught. One must wonder how many other times serious constitutional errors are not caught merely because the sentencing judge has kept his reasoning to himself. This is appeal by luck, not law.

Once again, we turn to the tripartite test of *Mathews v. Eldridge,* 424 U.S. 319, 335, and *Goldberg v. Kelly,* 397 U.S. 254, 263-271, to evaluate whether due process requires a sentencing judge to state the reasoning behind his sentence: First, what is the nature of petitioner's private interest affected by the official action? Here again petitioner's interest is his liberty interest—he may have to spend the next forty years of his life behind bars. There is no doubt that the liberty interest in receiving only a constitutional sentence is one of the most fundamental rights protected by the United States Constitution. *Morrissey v. Brewer,* 408 U.S. 471, 482; *Wolff v. McDonnell,* 418 U.S. 539, 556-557.

Second, would "additional or substitute procedural safeguards" help protect petitioner's constitutional interest? One of the fundamental roles of due process is to provide regular procedures adequate to call to the attention of the appellate court in an orderly way errors in the criminal process. Yet, in one enormously important part (and often the most important part) of the criminal process—the sentencing process—there are no such effective procedures at this time.This Court has come a long way over the last 20 years to bring due process to the guilt stage of the trial. However, its appellate review of the constitu-

tionality of sentencing is still largely based upon luck and happenstance. Requiring the sentencing judge to articulate his reasoning for imposing the sentence entered would certainly give this Court a basis for reviewing the constitutional underpinnings of the sentence and it would bring out in the open what is now done in secret. Further, and quite apart from facilitating appellate review, requiring a judge to articulate the reasoning for his sentence will better focus his own thought process and will undoubtedly reduce the number of sentences in the first place that are imposed on an unconstitutional basis. *Dorszynski v. United States,* 418 U.S. 424, 455 (Marshall, J., concurring).[25]

Third, the benefit must be weighed against the additional "fiscal and administrative burdens" that the additional procedures would require. There is no doubt that there will be some inconvenience if the sentencing judge is required to articulate his reasons. However, this inconvenience should be slight. If the judge has already formulated his reasoning and rationale before deciding upon a sentence, it should be a simple matter to require that reasoning and rationale to be written down or stated on the open record. Petitioner is not asking for formal fin-

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[25] Although *Dorszynski* did not require the sentencing judge to set forth reasons supporting his finding that a youth offender would not benefit from treatment under the Youth Corrections Act, that holding was limited to the statutory interpretation of the Youth Corrections Act. The Court expressly declined to consider whether there is a constitutional requirement to set forth reasons supporting a sentence because that issue was not properly before the Court. *Id.,* 418 U.S. at 431, n. 7.

dings of fact and conclusions of law; just a simple statement of the basic reasons and evidence relied upon in imposing the sentence should be sufficient. On the other hand, if the sentencing judge has not completed his own thought process to the point that he can identify the reasons for imposing the sentence, there is a great risk that that sentence will be based in part upon irrational factors, erroneous information, or prejudice. It is precisely those cases that this Court should try to ferret out by the requirement of insisting that the trial judge go through the procedural steps of formulating and expressing the reasons for the sentence. And, where constitutional rights are involved, it is important that adequate procedures be established to protect those rights even though some slight additional cost to the state is required. See *Bell v. Burson,* 402 U.S. 535 at 540-541; *Shapiro v. Thompson,* 394 U.S. 618, 633. Further, this Court has already required express reasoning or findings to support sentencing discretion in other areas and it has not seemed to cause any undue hardship. See *Gregg v. Georgia,* 428 U.S. 153, *North Carolina v. Pearce,* 395 U.S. 711.

Weighed against this slight additional burden to the state, the benefit to the defendants involved would be great. No longer will they be left wondering why their loss of liberty is of so little consequence to the sentencing judge as not to warrant even a single sentence of explanation. This Court has often acknowledged that an important part of rehabilitation is to persuade a defendant that his punishment is fair and should be accepted. *Morrissey v. Brewer, supra,* 408 U.S. 471, 484; *Greenholtz v. Inmates,*

____ U.S. ____, 99 S.Ct. 2100 at 2117-2118 (Marshall dissenting in part). See also *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 171-172 (Frankfurter, J., concurring).[26]

It is axiomatic that all of us better accept that which we understand. We understand better that which is explained to us. When dealing with a right as precious as liberty, is it beyond the pale of the Constitution to require, for the dignity of the defendant's liberty, for the preservation of the appearance of impartiality by the courts, and for the rehabilitation of the defendant involved, that a simple explanation be required of the sentencing judge for the sentence imposed?

E. The Court of Criminal Appeals Violated Due Process When It Affirmed and Resentenced Petitioner Under A Different Statute Than the One Relied Upon At Trial.

At the trial the jury was instructed as follows:

> You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the

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[26] See also ABA Project on Minimum Standards For Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures,* par. 5.6.; ABA Project on Standards for Criminal Justice, *Appellate Review of Sentences,* pp. 2-3; Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal,* 60 Iowa L. Rev. 205, 235 (1974); Kaufman, *The Sentencing Process and Judicial Inscrutability,* 49 St. Johns L. Rev. 215, 221-222 (1975); Hennessey, *Disparity in Sentencing,* 3 New England J. Prison L. 5, 9-11.

execution of the sentence, *shall be* punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.

Under the facts of this case this means that *should you find that this defendant has been twice convicted of felony offenses* and that he committed the present offense within ten years of the completion of both of the previous offenses, then you *shall assess* his punishment at forty (40) years imprisonment in the State Penitentiary."[27] (emphasis added.) (A. 9)

Consequently, provided the jury found Hicks guilty of two prior felonies, the case was submitted to the jury only under § 51(B) as the exclusive and controlling statutory provision. This was reinforced by the prosecuting attorney, who argued to the jury that there wasn't any alternative; the legislature mandated a 40-year term and the jury must return a 40-year verdict if it found petitioner guilty of two prior felonies (A. 20, 25).

The jury did find that Hicks had committed two prior felonies and, in accordance with the judge's mandatory instruction under § 51(B), it returned a 40-year sentence against petitioner.[28]

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[27] This is, of course, the statutory language of § 51(B). The maximum penalty permitted under the substantive offense of selling heroin was 20 years. 63 O.S. 1976 2-401. That 20 years, when added to the additional 20 years mandated by § 51(B), equals the 40 years which the court instructed would have to be the jury verdict.

[28] The jury verdict read, "We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the defendant Flynn Noye Hicks guilt of Unlawful Distribution of a Controlled Dangerous Substance, after having been previously convicted of two felony offenses and assess his punishment at imprisonment in the State Penitentiary for a term of forty (40) years. (A. 40)

Upon appeal to the Oklahoma Court of Criminal Appeals, that court recognized that petitioner had been convicted and sentenced under § 51(B) and it then proceeded to find that statute unconstitutional.

> Defendant asserts in his fourth assignment of error that 21 O.S. Supp. 1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. (A. 58)

Faced with this record, the Oklahoma Court of Criminal Appeals simply decided that the expedient thing would be for it to sentence Hicks under a different habitual criminal statute, § 51(A), even though the jury had not premised its sentence on that statute and, indeed, had been instructed that it could not even consider any statute other than § 51(B) in the event it found Hicks guilty of two prior felony convictions (A. 57-60).

There can be no doubt that § 51(A) is a "penal" statute because it was the statute relied upon by the Court of Criminal Appeals in sentencing petitioner to 40 years imprisonment. See *Trop v. Dulles,* 356 U.S. 86, 97; *Giaccio v. Pennsylvania,* 382 U.S. 399, 402.

Nor can there be any doubt that § 51(A) and § 51(B), under which petitioner was tried and convicted below, differ in important and material respects. Section 51(A) is a discretionary statute, allowing sentencing of anywhere from 10 years to life. Section 51(B) is a mandatory statute requiring a 40-year sentence. Under § 51(A) petitioner

should have had a chance to present mitigating circumstantial evidence, a presentencing report prepared before sentencing, and an opportunity to argue for discretionary sentencing leniency. Section 51(B), however, allowed petitioner none of those rights or opportunities. Where mitigating evidence had not been relevant under § 51(B), petitioner should have been given a chance to come forward with such evidence when resentenced under the discretionary § 51(A). *Saunders v. Shaw,* 244 U.S. 317.

Furthermore, when the Oklahoma Court of Criminal Appeals did sentence Hicks under § 51(A), it represented a brand new sentencing decision under a totally different sentencing statute. It was not merely a modification of a sentence issued below. As has been noted previously a sentence under an unconstitutional statute is void and of no effect. *Brown v. State,* 24 P.2d 1013 (Okl.Cr. 1933); *Karns v. State,* 224 P. 373 (Okl.Cr. 1924); *Ex Parte Lange,* 18 Wall 163, 85 U.S. 872, 879. Thus, the Oklahoma Court of Criminal Appeals started with a fresh slate.

Finally, the Oklahoma Court of Criminal Appeals invoked § 51(A) and issued a 40-year sentence thereunder against petitioner without any warning whatever, without hearing or notice to petitioner, without giving petitioner any opportunity to present mitigating evidence, without a presentence report, and without giving petitioner or his counsel any opportunity at any time in the entire criminal proceeding to plead for sentencing leniency. This sentence was imposed against petitioner for the first time at the very end of a long criminal process in the fourth from the last paragraph of the Opinion of the Court of Criminal Appeals affirming his conviction.

It is petitioner's contention that he was denied due process of law when the Court of Criminal Appeals convicted and sentenced him under a different statute than the one under which he was convicted and sentenced below.

This is not the first time that the Oklahoma Court of Criminal Appeals has decided to affirm a conviction upon a statute different from that upon which the trial below was conducted. In *Eaton v. Tulsa,* 415 U.S. 697, this Court in a per curiam opinion struck down an Oklahoma conviction where the defendant at the trial was convicted of contempt of court for using an obscenity. The Court of Criminal Appeals concluded that this one expletive might be insufficient to support a contempt charge, but that the defendant had also been "discourteous" in the courtroom in other matters as well. The Oklahoma Court of Criminal Appeals then concluded that "coupling defendant's expletive with the discourteous responses, it is this Court's opinion there was sufficient evidence upon which the trial court *could* find defendant was in direct contempt of the court." *Id.*, 415 U.S. at 698. This Court reversed that conviction saying,

> However the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty. . . .The Court of Criminal Appeals thus denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made. *Id.*, 415 U.S. at 698-699.[29]

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[29] Notwithstanding this admonition, the Oklahoma Court of Criminal Appeals has continued its practice of upholding a conviction

This Court has long held that it violates due process to convict a defendant under a charge other than the one upon which he was tried below. In *Cole v. State of Arkansas,* 333 U.S. 196, the Court was faced with a situation where the defendant was charged and convicted at trial under one section of an Arkansas statute but on appeal the Arkansas Supreme Court upheld the conviction under a different section of the same statute on the basis that there was adequate evidence at trial to have warranted a conviction under the second section. This Court held that to be unconstitutional, saying,

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried

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upon charges and evidence different from that upon which the lower court verdict was based. See *Breshers v. State,* 572 P.2d 561 (Okl.Cr. 1977). There, the court found constitutional defects in the defendant's conviction of second degree murder. However, instead of remanding for a new trial, it concluded that, "it is the opinion of this Court that the interests of justice will be served best by vacating the judgment and sentence for Second Degree Murder and remanding this case to the District Court with instructions to enter a new judgment and sentence finding the defendant guilty of Manslaughter in the First Degree and imposing sentence on defendant of twenty-five (25) years under the direction and control of the Department of Corrections." It mattered not to the Court of Criminal Appeals that the defendant was not charged with manslaughter in the first degree. Indeed, such an instruction had been tendered and rejected. (See certified copies of those jury instructions on file with the clerk of this Court.) Nor was the jury there allowed an opportunity to reach its own judgment about what kind of sentence the defendant should have received under first degree manslaughter.

> and as the issues were determined in the trial court. *Id.*, 333 U.S. at 202.

See also *DeJonge v. Oregon,* 299 U.S. 353, 362.

This principle was extended to the sentencing process in *Presnell v. Georgia,* 439 U.S. 14. There, at the sentencing stage of trial the jury returned a death penalty upon a finding that the crimes upon which the defendant was convicted had been committed in conjunction with certain other supporting crimes. The Georgia Supreme Court found error in relying upon the supporting crimes set forth as justification for the jury verdict of death, but it did find adequate evidence that could have supported the finding of a different supporting crime to warrant the death penalty. Based upon this new supporting crime, the Georgia Supreme Court affirmed the death penalty.

This Court, in a per curiam opinion, held that that procedure violated defendant's due process rights.

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." [Citations omitted.]
>
> These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt determining phase of any criminal trial. 439 U.S. 14, 58 L.Ed.2d 207 at 211.

Although *Presnell* was a capital punishment case, it is inconceivable that such "*fundamental* principles of procedural fairness" would not apply with equal force at the penalty stage of a trial where a defendant may forfeit 40 years of his life. See *Mempa v. Rhay,* 389 U.S. 128; *Specht v. Patterson,* 386 U.S. 605; *Gardner v. Florida,* 430 U.S. 349, 358, *Furman v. Georgia,* 408 U.S. 238 at 414, 447 (Powell, J., dissenting) ("The Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.' ").

The most recent occasion that this Court has had to consider a situation where the appellate court attempted to uphold a conviction upon grounds different from those which formed the basis of the conviction at the trial level was the case of *Dunn v. United States,* ____ U.S. ____, 47 L.W. 4607 (June 4, 1979). In that case, the Court unanimously held (Justice Powell taking no part in the consideration or decision of the case) that it violated due process when a defendant was convicted of perjury at the trial based upon one statement and his conviction was affirmed on appeal based upon the same statement but made at a different place and time. The Court concluded that,

> [A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

In short, the law is clear that an appellate court may not uphold a conviction or sentence upon ground different than those relied upon to support the conviction and sentence below. If anything, what happened to petitioner was even more a violation of his due process rights because

the Oklahoma Court of Criminal Appeals didn't simply try to uphold the lower sentence upon different grounds; it duplicated the prior void sentence and issued it as a brand new sentence against him upon a basis that was directly contrary to the jury instruction given below. *Cf. In re Oliver,* 333 U.S. 257.

II. It Was Cruel and Unusual Punishment in Violation of the Eighth Amendment To Sentence Petitioner to 40 Years Imprisonment Under 21 O.S. Supp. 1977, § 51(A).

A. Punishment Under 21 O.S. Supp. 1977, § 51(A) Is Cruel and Unusual Because It Makes No Measurable Contribution To Acceptable Goals of Punishment, But Rather Constitutes Only The Needless Imposition of Pain and Suffering.

It is now well established that the Eight Amendment, as applied to the states through the Fourteenth Amendment, prohibits punishments that are "excessive" in relation to the crime committed.[30] *Coker v. Georgia,* 433 U.S.

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[30] Petitioner is *not* here advancing the argument that 40 years imprisonment is so long that it *must* under any circumstances be regarded on its face as excessive for punishment of one sale of heroin following two prior felony convictions. Compare *Rummel v. Estelle,* 587 F.2d 651 (1968), *cert. granted,* 60 L.Ed. 1064 (May 21, 1979). Rather, petitioner is arguing that *this* sentence under *this* particular statute is "excessive" (and indeed even a far shorter sentence would be "excessive") *because* the sentence makes no measurable contribution to acceptable goals of punishment and because it was imposed in a feckless and arbitrary way. *Furman v. Georgia,* 408 U.S. 238, 306-310 (Stewart, J., concurring). *Id.* at 310-314 (White, J., concurring); *Robinson v. California,* 370 U.S. 660, 667. As a result, it is not

584 at 592; *Gregg v. Georgia,* 428 U.S. 153 at 173; *Furman v. Georgia,* 408 U.S. 238, 243 (Douglas, J., concurring); *Id.* at p. 457 (Powell, J., dissenting).

This principle is not limited to capital offenses, but applies also to sentences of imprisonment that are excessive and out of proportion to the offenses involved. *Weems v. United States,* 217 U.S. 349, 367, 368; *Trop v. Dulles,* 356 U.S. 86, 100; *Robinson v. California,* 370 U.S. 660, 676 (Douglas, J., concurring); *O'Neil v. Vermont,* 144 U.S. 323, 339-340 (Fields, J., dissenting).

This Court has suggested a test to determine when the punishment is excessive to the offense in *Coker v. Georgia,* 433 U.S. 584 at 592. There the Court said:

> [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than

necessary for the Court to speculate whether petitioner will really be imprisoned for 40 years or whether he might be discharged at an earlier date. However, for the Court's information and to the extent of petitioner's best knowledge and information, Oklahoma allows *no* automatic credit for good behavior while serving time. However, one day of good time may be earned for each day that the inmate participates in a work or education program, and additional good time credits may be earned by giving blood. 57 O.S. Supp. 1979 § 138. The earned good time credits may be lost for bad behavior. Although the parole board must begin to consider each inmate for parole after he has served one-third of his sentence, there is no guarantee that parole will be given at any time since this is purely a matter of discretion with the parole board and the governor. 57 O.S. § 332.7. In any event, parole is both burdensome and hazardous, requiring close scrutiny of the parolee and many restrictions on his life throughout the remaining term of his parole. Pardon and Parole Board Policy No. 005.

> the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

See also *Gregg v. Georgia,* 428 U.S. 153, 173. The "measurable contribution" test has also been expressed as a requirement that the penalty be "rationally directed to achieve the legitimate ends of punishment." *Trop v. Dulles,* 356 U.S. 86 (Brennan, J., concurring); *Robinson v. California,* 370 U.S. 660, 678 (Harlan, J., concurring).

It is petitioner's contention that § 51(A), under which he was sentenced, does not "rationally" relate to acceptable goals of punishment or make a "measurable contribution" to such goals.

In order to develop this contention it is necessary first to identify the "acceptable goals" of punishment. This Court has, on various occasions, identified four such goals: (1) rehabilitation, (2) deterrence, (3) isolation, and (4) retribution.[31] *Trop v. Dulles,* 356 U.S. 86, 111 (Brennan, J.); *Spencer v. Texas,* 385 U.S. 554 at 571 (Warren, C.J., dissenting); *Furman v. Georgia,* 408 U.S. 238, 342 (Marshall, J., concurring); *Id.* at pp. 451-452, n. 43 (Powell, J., dissenting).

Rehabilitation—Probably the primary justification for enhancing punishment for an habitual criminal is that

[31] There is less agreement about retribution as an acceptable goal than there is about the other goals. *Furman v. Georgia,* 408 U.S. 238 at 342-345 (Marshall, J.); *Id.* at 304-305 (Brennan, J.); *Morissette v. United States,* 342 U.S. 246, 251.

the previous normal range of punishments have proved inadequate to rehabilitate the defendant. *Pennsylvania ex rel Sullivan v. Ashe,* 302 U.S. 51, 54-55 ("Persistence in crime and failure of earlier discipline effectively to deter or reform justify more drastic treatment."); *Moore v. Missouri,* 159 U.S. 673, 677 ("[T]he statute 'imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed;' . . .").

One could therefore conclude that enhanced penalties could not rationally be invoked against a recidivist upon the pretext that the normal penalties had failed to rehabilitate him unless it is first shown that normal penalties had been tried. Specifically, before an enhanced imprisonment term can be justified, there should have to be a showing that a normal range of imprisonment has first been tried upon the defendant.[32] However, the Oklahoma recidivist statute under which petitioner was sentenced does not require that any actual jail time have been served on the prior offenses. And, in fact, petitioner

[32] Indeed, many state and federal statutes require actual time to have been served in the penitentiary before a recidivist penalty can be invoked. See California, P.C. § 667.5 (West Supp. 1978); Connecticut, G.S.A. § 53a-35, 53a-40 (1972 and Supp. 1978); Kentucky, R.S.A. § 532.080 (Supp. 1978); Maryland, A.C. Art. 27, § 643B (Supp. 1978); Massachusetts, M.G.L.A. Ch. 279 § 25 (West 1972); Mississippi, M.C.A. § 99-19-81-83 (Supp. 1978); Montana, R.C.A. § 46-18-501, 502 (1978); Nebraska, R.S. § 29-2221 (1975); New Hampshire, R.S.A. § 651.6 (1974); Rhode Island, G.L. § 12-19-21 (1969); United States, 18 U.S.C. 3575 (1976); Utah, C.A. § 76-8-1001 (1977).

here served *no* time in prison on his prior convictions.[33] This heroin conviction represents the very first effort by the State of Oklahoma to rehabilitate petitioner through imprisonment. But instead of trying a normal jail sentence of 5-20 years as authorized by the dangerous drug statute under which he was convicted, the State invoked the recidivism statute to justify an imprisonment of 40 years for the identical crime that petitioner's codefendant was punished for 5 years.

How can it be "rationally" determined that an enhanced punishment is necessary or even useful if a normal prison term has not been tried first? And if no such case can be made for the need for the enhancement portion of the sentence, is it not simply a "purposeless and needless imposition of pain and suffering"? *Furman v. Georgia,* 408 U.S. 238, 279 (Brennan, J., concurring); *O'Neil v. Vermont,* 144 U.S. 323, 339-341; *Weems v. United States,* 217 U.S. 349, 381; *Coker v. Georgia,* 433 U.S. 584, 609-610 (Burger, C.J., dissenting).[34]

[33] The "judgment and sentence suspended on plea of guilty" for each of petitioner's prior two felony convictions are public records, and true copies have been lodged with the Clerk of this Court. Similarly the Appearance Dockets in both those cases have also been lodged with the Court Clerk and they show that the suspended sentences were never revoked.

[34] Several studies suggest that recidivism statutes are generally ineffective in rehabilitation. See *Recidivist Impacts of Differential Sentencing Practices for Burglary Offenders,* Criminology, pp. 387-396 (Nov. 1977); Rubin, *Law of Criminal Correction* (2d ed. 1973) ("it may be justly said that in the United States the recidivist laws have never been successful."); Brown, *The Treatment of General Recidivist Statutes,* 48 Colum.L.Rev. 238 (1948).

This Court should rule that punishment under a recidivist statute is cruel and unusual unless it is established that the defendant has first received at least one prior jail term for an earlier offense. Otherwise, such punishment may be likened to a situation where parents twice threaten their child with a spanking for telling lies, but each time the threat is not carried out. The third time the child lies, the parents subject him to a terrible whiplashing on the theory that the punishment of spankings has proven ineffective to deter him from lying. Whatever else can be said about the imposition of a recidivist penalty as the first actual jail term, it is not a "graduated" or "proportioned" approach to punishment. *Weems v. United States,* 217 U.S. 349, 367.

Deterrence—The Eighth Amendment requires that, for deterrent purposes, the extent of the punishment be related to the seriousness of the offense. *Powell v. Texas,* 392 U.S. 514, 531-532; *Weems v. United States,* 217 U.S. 349, 367; *Furman v. Georgia,* 408 U.S. 238, 303-304 (Brennan, J., concurring). Here, § 51(A) makes no effort whatsoever to fit the punishment to the crime. A defendant who has previously been convicted of just one prior felony, even a relatively minor felony, may be subject to up to life imprisonment upon the conviction of a second felony, again, even though the second felony is relatively minor. On the other hand, a defendant could accumulate a great many convictions of crimes as serious as first degree manslaughter or second degree rape and receive as little as 10 years under this statute. There is nothing "graduated"

or "proportional" about this punishment and there is no effort to make the punishment fit the crime.[35]

There are many ways that a statute could be written so that it does have some proportionality to the seriousness of the offenses committed. It could multiply the punishment available for the last crime committed[36] or it could simply add a specified number of years to the penalty range of the last offense.[37] It could move the punishment for the last offense to the next higher punishment category.[38] Any rational formula that relates the

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[35] This argument is specifically directed to § 51(A)(1) under which petitioner was sentenced which allows punishment from 10 years to life upon the subsequent conviction of any felony punishable by five years or more in the penitentiary. Under Oklahoma law, that covers most felonies, including such relatively minor offenses as passing a bad check of $21. 21 O.S. Supp. 1979 § 1514.2. Felonies that are more minor than this are treated differently under § 51(A)(2) which imposes a maximum prison term of 10 years. Section 51(A)(3) deals with attempted felonies.

It does not help to speculate that the jury or sentencing judge may provide the proportionality when they exercise their discretion. Some may, and some may not. As pointed out previously, there are no standards giving them even the slightest hint that they should try for proportionality. There is no general legislative directive that the punishment should fit the crime. As far as § 51(A) is concerned, that factor has no significance. And, as the cases in footnote 18 indicate, there has been no proportionality in practice under § 51(A). The sentences modified thereunder by the Court of Criminal Appeals alone show a freakishness and randomness that brings the entire sentencing process into disrepute.

[36] See, *e.g.*, Arizona, R.S.A. § 13-604, 13-702 to 703 (1979); Kansas C.C. § 21-4504 (Vernon Supp. 1978); Louisiana, C.C.P.A. Art. 15:529.1 (1956 and Supp. 1978).

[37] See, *e.g.*, Wisconsin, S.A. § 939.62 (West 1975 and Supp. 1978).

[38] See, *e.g.*, South Dakota C.L.A. § 22-6-1, 22-7-7-9 (Supp. 1978).

punishment to the crime would be acceptable. However, if the more serious criminals need a threat of greater punishment to deter them (and that is the critical assumption that all recidivist statutes must be based upon or they would make no sense at all under a deterrence analysis) then how can a recidivist statute be said to make a "rational" or measurable" contribution to deterrence if it ignores both the *seriousness* of the crimes involved[39] and the *number* of prior convictions? Isn't it then a bankrupt statute that simply stands as a trap to impose freakish punishments in a whimsical or capricious way without rationality?[40] *Weems v. United States,* 217 U.S. 349, 381.

Isolation—The same comments may be made about isolation as were made about deterrence. Society's interest in isolation should relate to the seriousness of the crimes committed by the defendants being isolated. No such relationship is found in § 51(A).

Retribution—Even assuming retribution is a proper goal of punishment, it too must be proportional to the offense committed. *O'Neil v. Vermont,* 144 U.S. 323, 340 (Field, J., dissenting). Here the statute authorizes punishment all out of proportion to the severity of the offense, and thus invites the infliction of needless pain and suffering beyond that which society could legitimately request in

[39] See footnote 35.

[40] The same point may also be made here as was made with regard to the goal of rehabilitation: unless the state has first tried normal jail terms within the limits prescribed by the regular substantive statutes, how can it be said that enhanced sentences are necessary or even useful to deter recidivists? See the cases cited, *supra.*

retribution.[41] Compare Hick's 40-year sentence to his codefendant's 5-year sentence for exactly the same offense. See *Coker v. Georgia,* 433 U.S. 584, 592.

Thus, it may be seen on its face that 21 O.S. Supp. 1977 § 51(A) is not designed to meet any of the acceptable goals of punishment, and it provides for excessive, irrational, capricious, cruel and unusual punishment. But then one may ask what is the purpose of this Oklahoma statute? What is it, precisely, that the State of Oklahoma intended to punish when it enhanced petitioner's punishment to 40 years? We can assume that Oklahoma was not intending to impose additional punishment for the petitioner's previous crimes, because that would be double jeopardy. *McDonald v. Massachusetts,* 180 U.S. 311; *Graham v. West Virginia,* 224 U.S. 616; *Moore v. Missouri,* 159 U.S. 673. We know also that petitioner was not being punished solely for his single $50 sale of two balloons of heroin because the Oklahoma Legislature has determined that the maximum punishment for that offense, without more, is 20 years. 63 O.S. Supp. 1976, § 2-401(B). The Oklahoma Court of Criminal Appeals has answered our inquiry in previous cases by acknowledging that its statutes punish a recidivist more severely because of his "state" as a prior criminal. *Barger v. Burford,* 225 P.2d 196, 198 (Okl.Cr. 1950), " 'habitual criminality is a *state* and not a crime.' " (Emphasis added.) See also

[41] The appendix in *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977), gives examples such as the verdict of 999 years upon conviction of Robbery with Firearms after a former felony conviction. Other sentences for the same offense varied from 99 years (modified to 50 years); 50 years (modified to 35 years), and 40 years (not modified at all).

Ellison v. Oklahoma, 493 P.2d 837, 840 (Okl.Cr. 1972); *Ex Parte Bailey,* 64 P.2d 278, 280 (Okl.Cr. 1936).[42]

Thus, the enhancement portion of petitioner's penalty is because of his "state" or status as a man with a prior conviction record. The State of Oklahoma has simply made an irrebutable presumption that because petitioner has had one or more prior felony convictions he is a bad person and deserves to be punished more severely.[43] This the State of Oklahoma may not do. *Robinson v. California,* 370 U.S. 660.[44]

B. Petitioner's Sentence is Cruel And Unusual Because It was Inflicted In An Arbitrary and Capricious Manner.

Quite apart from the excessiveness of the punishment, if such punishment is imposed in an arbitrary, capricious

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[42] Saying that the recidivist statute in Oklahoma does not define a crime is of no significance. It is clearly a penal statute because it imposes punishment. As a penal statute, it must comport with the requirements of the Eighth Amendment whether the State of Oklahoma recognizes it as a crime or not. *Trop v. Dulles,* 356 U.S. 86, 97.

[43] This presumption insofar as petitioner was concerned was irrebuttable in part because the Oklahoma Court of Criminal Appeals never allowed him a hearing or any other opportunity to rebut the presumption that he was a bad man and needed an enhanced term of imprisonment.

[44] This reasoning would not require the wholesale abrogation of recidivist statutes throughout the country. Recidivism statutes that are directed toward proper goals of punishment would be in a different category. But where this Court is faced with an irrational statute that does not appear to be proportionally related to any acceptable goal of punishment and where this Court has the advantage of an interpretation of the statute by the highest court in the state candidly admitting that the incremental punishment is solely because of the defendant's "state" as a man with prior convictions, it must be struck down. *Robinson v. California, supra.*

and freakish manner, it may also be cruel and unusual. *Gregg v. Georgia,* 428 U.S. 153, 188-189; *Furman v. Georgia,* 408 U.S. 238, 249 (Douglas, J., concurring); *Id.,* at 274, 277 (Brennan, J., concurring); *Id.* at 309; *Id.* at 310-314 (White, J., concurring). In essence, this Court has articulated an approach that a punishment may be cruel and unusual not only because of its intrinsic severity but also because of the procedures used in imposing it. Although this Court has never invalidated a sentence short of death because of the procedure under which it was imposed, that would seem to be a logical extension of its previous rulings. In essence this argument incorporates the arguments made under the due process clause except that the petitioner is now asking that the Court also judge the sentencing procedures used against him under the Eighth Amendment.

Petitioner's 40-year sentence was "unusual" in the same sense that being struck by lightning is unusual. *Furman v. Georgia,* 408 U.S. 238, 309 (Stewart, J., concurring). It came without warning from on high. It singled out the petitioner for unusually severe treatment: eight times more severe than his codefendant. And, it was unusual in that the Court of Criminal Appeals reduced most of the other sentences that had been unconstitutionally imposed under § 51(B).[45]

Petitioner's penalty was cruel because of the procedure under which it was issued. As mentioned before,

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[45] See n. 18, *supra.*

petitioner was not given any opportunity to present any mitigating circumstances or even to make the most elementary plea for leniency or mercy. He was not even allowed to face the sentencing court that has now charted the rest of his adult life. Going into the sentencing process he had no idea what standards the court might use to measure his punishment, and coming out of the process he has no idea what standards or factors were in fact used. The Court of Criminal Appeals has not offered so much as a single word of explanation for his sentence that could serve to rehabilitate him or deter others.

This Court said in *Gregg v. Georgia,* 428 U.S. 153 at 173, 182, that one of the "basic concepts underlying the Eighth Amendment" is that the penalty must "accord with 'the dignity of man'." *Id.* at 173; *Trop v. Dulles,* 356 U.S. 86, 100. Surely 40 years of a man's life is worth some explanation and some right to be heard. The State may have the naked power to take away 40 years of a man's life, but it accords that man no dignity if it does not give him a hearing and if it does not give him an explanation of why such a penalty was imposed upon him. This is the difference between "unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." *Weems v. United States,* 217 U.S. 349, 381.

III. Petitioner Was Denied Equal Protection of the Law When He Was Classified Under An Admittedly Unconstitutional Statute and Then, Based Upon That Classification, He Was Discriminated Against By Being Denied State and Federal Guaranteed Rights.

At the time that Hicks was tried and convicted, the Oklahoma Habitual Criminal Statute, 21 O.S. Supp. 1977, § 51, had two separate, discrete sections: Sections 51(A) and 51(B). Section 51(A) provided for discretionary sentencing from ten years to life upon the conviction of a felony punishable by five years or more accompanied by proof of a prior felony conviction. Section 51(B) called for mandatory sentencing of the maximum term permitted under the last offense plus 20 years when the last conviction is accompanied by proof of *two* or more prior felony convictions. Petitioner was charged, tried, convicted and sentenced under § 51(B) (A. 4-6, 9, 20, 25, 40, 58).

Following this conviction but before petitioner's appeal was heard, the Oklahoma Court of Criminal Appeals decided *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). In that decision, the court struck down § 51(B) as unconstitutional. The Appendix which was attached to its opinion makes it clear that § 51(B) was struck down because it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court's reasoning was that § 51(A) and § 51(B) classified all habitual criminals in Oklahoma as either one-time prior offenders or offenders with two or more prior convictions: the one-time prior offenders being sentenced under § 51(A) and those with two or more prior offenses being

sentenced under § 51(B). The analysis proceeded that because § 51(B) set mandatory limits on punishment, whereas § 51(A) allowed discretionary sentencing of anywhere from 10 years to life imprisonment, it was possible for a defendant with one prior conviction to be sentenced to a much more severe sentence than the defendant with two or more prior convictions.[46]

The Appendix to the court's opinion articulated the Fourteenth Amendment test as follows,

> "The equal-protection clause of the 14th Amendment to the Constitution of the United States only requires that classifications made by a municipal legislative body be reasonable, not arbitrary, and rest upon some ground of distinction having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 475.

The court found that the purpose of the legislation was to punish more severely those with two or more prior offenses than those with only one prior offense. Yet, § 51(B), when compared to § 51(A), did not reasonably relate to this legislative purpose because under § 51(A) there was "the possibility, and indeed the probability" of a greater punishment than under § 51(B). Because this

[46] The *Thigpen* case pointed this out graphically because that case involved two defendants who were tried for the same crime. One of the defendants had one prior conviction and the other had two. Although in that case both defendants had been proceeded against under § 51(A) and both had received discretionary jail terms of 67 years, had the defendant with two prior convictions been proceeded against under § 51(B) as he was claiming he had a right to be, his maximum mandatory sentence would have been only 27 years.

classification of those charged as habitual criminals into two groups pursuant to §§ 51(A) and 51(B) was not rationally related to the legislative purpose, the court struck down § 51(B) as unconstitutional. This meant that all habitual offenders had to be proceeded against under § 51(A).

When petitioner's case finally came to the Court of Criminal Appeals, it agreed that petitioner had been improperly sentenced under an unconstitutional statute. The effect of this is that petitioner's prior sentence was void. *In re Lange,* 18 Wall 163; *Brown v. State,* 24 P.2d 1013 (Okl.Cr. 1933);*Karns v. State,* 224 P. 373 (Okl.Cr. 1924). But instead of remanding the case to the district court jury for a new sentencing trial, the Court of Criminal Appeals simply imposed a new sentence upon petitioner itself under § 51(A).

The classification upon which petitioner relies to establish his equal protection argument is the classification that existed at the time of his trial wherein defendants with one prior conviction were prosecuted under § 51(A) and those with two or more prior convictions (like petitioner) were prosecuted initially under § 51(B). This classification has already been held to be irrational, illegal and unconstitutional. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977).

The discrimination that petitioner claims flowed as a result of this illegal classification is that, while those who were initially sentenced under § 51(A) were afforded their statutory right to jury sentencing,[47] those who were initial-

[47] See, *e.g.*, *Fischer v. State*, 593 P.2d 507 (Okl.Cr. 1979); *Burney v. State,* 594 P.2d 1226 (Okl.Cr. 1979).

ly sentenced illegally under § 51(B) and resentenced under § 51(A) by the Oklahoma Court of Criminal Appeals were denied this right. They were also denied a hearing or any other opportunity to present mitigating circumstances going to the proper exercise of sentencing discretion.[48] The Oklahoma Court of Criminal Appeals substituted its discretion for that of a jury in imposing its own sentence under § 51(A).[49]

The traditional standard under which an Equal Protection analysis must proceed is stated as follows in *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920),

> [T]he classification must be reasonable, nor arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

This is, of course, the same test employed in *Thigpen,* and under that test this classification has already been declared unconstitutional. The classification of prosecuting habitual criminals with one prior conviction under § 51(A) and those with two or more prior convictions under § 51(B) is not reasonable; it is arbitrary; it is

[48] See fn. 18, *supra.*

[49] The jury that should have sentenced petitioner, had he been correctly charged in the first place under § 51(A), exercised its discretion to return the lowest sentence permissible against his codefendant for commission of the same crime. Had it been able similarly to exercise its discretion in sentencing petitioner under § 51(A), petitioner might have received a 10-year sentence rather than the 40-year sentence imposed by the Court of Criminal Appeals. The loss of this opportunity represents a significant injury to petitioner.

unfair; and it bears no substantial relation to the purpose of the legislation. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977).

As illogical and irrational as it may have been initially to proceed against one class of habitual criminals under § 51(A) and another class under § 51(B), it is totally and absolutely irrational and arbitrary to use this classification to determine who shall, and who shall not, be entitled to jury sentencing and a hearing before sentencing. What possible legitimate, rational state objective could there be to choose to deprive one group of habitual criminals of their right to a hearing and jury sentencing on the sole basis that they had been previously prosecuted by the state under an unconstitutional statute?[50] If anything, once it has been

[50] The State of Oklahoma has not tried to justify this discrimination on the basis of a fiscal argument, and indeed it could not do so. This Court has often observed that such considerations are not overriding when equal access to important procedural rights are involved. *Griffin v. Illinois,* 351 U.S. 12; *Douglas v. California,* 372 U.S. 353. As this Court recognized in *Shapiro v. Thompson,* 394 U.S. 618, 633, "[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens . . . The saving of . . . costs cannot justify an otherwise invidious distinction."

Indeed, since it was the State itself that created the unconstitutional classification in the first place, it can scarcely complain that it must now bear the cost of a second jury sentencing procedure to correct the error.

In any event, the cost to the State of Oklahoma to provide a hearing and resentencing by a jury for all defendants unconstitutionally sentenced under § 51(B) and resentenced under § 51(A) by the Court

determined that a state has effected an unconstitutional classification, it should take steps to remedy and eradicate the unconstitutional classification. *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1. Oklahoma did just the opposite. Having found that it had created an unconstitutional classification, it compounded the injury by telling those who were illegally classified (and who had already been forced through one unconstitutional sentencing proceeding) that that classification was to be used again, this time to deny them their State-guaranteed right to be sentenced by a jury[51] and their federal right to a hearing before sentencing. This resulted in an unconstitutional discrimination against them.

What has already been said is surely enough to establish a violation of petitioner's equal protection rights under the rational basis test. However, for this Court's additional consideration if it deems it necessary, petitioner also advances the argument that the Oklahoma Habitual Criminal Statute should be subject to "strick scrutiny"

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of Criminal Appeals cannot be great. Section 51(B) was enacted in 1976 and did not become effective until May 10, 1976. By November 15, 1977, the Oklahoma Court of Criminal Appeals had declared § 51(B) unconstitutional in *Thigpen v. State,* 571 P.2d 467 (Okl. Cr. 1977). Thus, such a ruling would only affect a limited number of habitual criminals who were originally and erroneously tried and sentenced under § 51(B).

[51] It is true that a State is not required by the federal Constitution to provide jury sentencing. Nevertheless, when a State does grant jury sentencing it may not do so in a way that discriminates against some habitual criminals on the basis of an unconstitutional and irrational classification. *Cf. Griffin v. Illinois,* 351 U.S. 12, 18.

because it rests upon a suspect classification and because it impinges upon petitioner's fundamental liberty interests.

The list of classifications that this Court has held to be "suspect" to date is not very long and the list is obviously not yet fully developed: *E.g.,* race, *Loving v. Virginia,* 338 U.S. 1; alienage, *Graham v. Richardson,* 403 U.S. 365; and illegitimacy, *Glona v. American Guarantee & Liability Ins.,* 391 U.S. 73.

The common factor in the "suspect" classifications appears to be that they are based on involuntary characteristics. An individual has no voluntary control over his race, alienage or legitimacy. By contrast, when the individual is thought to have some control or influence over the characteristics which form the basis for the classification, such classifications have not been considered suspect. For example, although poverty is not necessarily voluntary, there is apparently enough of a possibility that one may influence his own economic status that wealth has been held not to be a suspect classification. *San Antonio School Dist. v. Rodriguez,* 411 U.S. 1. See *United States v. Kras,* 409 U.S. 434.

The classification of sex presents an interesting study in this analysis because some sex-related characteristics like pregnancy are voluntary, and there the Court has apparently not considered the classification to be suspect. *Geduldig v. Aiello,* 417 U.S. 484. However, where gender alone in involved, the Court, while sometimes articulating the language of the rational basis test, has appeared to have applied a heightened form of scrutiny. *Reed v. Reed,* 407 U.S. 71; *Frontiero v. Richardson,* 411 U.S. 677; *Craig v. Boren,* 429 U.S. 190.

Although petitioner admits this test is not perfect or infallible, it does appear to offer some rough guide as to which additional classifications may be suspect. Using this guide, it can be said that petitioner was placed in a suspect classification. Petitioner surely had no control over the fact that the state chose to classify those charged with habitual criminal offenses in an unconstitutional manner. No one asked petitioner if he would have preferred to be prosecuted under § 51(A) rather than § 51(B).[52]

Not every improper state classification need form the basis for a suspect classification but, when the state's highest court has already concluded that the classification was "unconstitutional" under the Fourteenth Amendment, are we to pretend that that classification is not then at least "suspect"? Indeed, at that point, the classification has passed beyond the "suspect" stage; it has already been tried and found unconstitutional. If the state *thereafter* continues to use that classification to discriminate and deprive one group of people of their constitutional rights, ought not that further act of discrimination at least be subject to strict scrutiny?

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[52] Although it might be asserted that the petitioner did have some control over the decision to commit the prior offenses in the first place, that would miss the point. The illegal classification and discrimination here is not between those who have and have not committed prior offenses. It is between those with prior offenses who were sentenced under § 51(A) and those with prior offenses who were unconstitutionally sentenced under § 51(B). This classification was dictated by state law at the time petitioner was charged and tried and he had no control over that classification.

Finally, petitioner would suggest that his liberty interest threatened by a lengthy term in prison is a "fundamental" interest, which also should invoke the strict scrutiny test. Again, petitioner acknowledges that this Court has not yet gone so far, but other courts have. See the opinion of the California Supreme Court in *People v. Olivas,* 17 Cal.3d 236, 551 P.2d 375 (1976), and the opinions of the United States District Court for the District of Connecticut in *United States ex rel Robinson v. York,* 281 F. Supp. 8 (D. Conn. 1968) and *Bolling v. Manson,* 345 F. Supp. 48 (D. Conn. 1972).

Short of the loss of life itself, it is hard to imagine the loss of any constitutionally protected right that is more "fundamental" or dear than 40 years of one's liberty. Hicks walked into prison as a young man of 28 years of age (R. "Conviction: Summary of Facts"). He may walk out of prison only two years shy of his 70th birthday. Surely this is at least as "fundamental" an interest as some of the other interests so characterized by this Court: *Shapiro v. Thompson,* 394 U.S. 618 (interstate movement); *Skinner v. Oklahoma,* 316 U.S. 535 (right to procreate); *Reynolds v. Sims,* 377 U.S. 533 (right to vote). Indeed, even expressed in the terms of these existing "fundamental" interest cases, petitioner can invoke the strict scrutiny test because a 40-year jail term effectively precludes at least interstate movement and the right to procreate.

If the strict scrutiny test is invoked, then the burden would shift to the State of Oklahoma to establish (1) that it has a *compelling interest* which justifies depriving peti-

tioner of the right to jury sentencing and a presentencing hearing while allowing others charged under § 51(A) to have these rights, and (2) that the distinction drawn by the law between those initially sentenced under § 51(A) and those who were resentenced under § 51(A) after having been initially sentenced unconstitutionally under § 51(B) is *necessary* to further its compelling state interest. *Reynolds v. Sims,* 377 U.S. 533; *Shapiro v. Thompson,* 394 U.S. 618.

The State of Oklahoma has already admitted that it would fail this test. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). See also the arguments advanced by petitioner under Section II of this Brief dealing with the Cruel and Unusual Punishment prohibition of the Eighth Amendment.

Whether this Court chooses to measure Oklahoma's actions under the traditional test or under the strict scrutiny test, the result is the same: petitioner has been denied Equal Protection of the Law.

CONCLUSION

The judgment of the Oklahoma Court of Criminal Appeals should be reversed and this case should be remanded to that court with instructions that petitioner be released from confinement unless, within a reasonable time, the State of Oklahoma chooses to cause petitioner to be resentenced by a jury upon notice and a fair hearing under 63 O.S. § 2-401.

Respectfully submitted,

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OF RESPONDENT

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In the
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OF RESPONDENT

OPINION BELOW

This is an appeal resulting from a judgment and sentence rendered in the District Court of Oklahoma County, State of Oklahoma on April 22, 1977. Therein Petitioner was tried and convicted by a jury of Unlawful Possession of Heroin with Intent to Distribute in violation of 63 O.S. Supp. 1976, § 2-401. The jury assessed punishment in accordance with the Oklahoma Habitual Criminal Act, 21 O.S. Supp. 1977, § 51(B), for a term of forty (40) years imprisonment. The record of the aforesaid proceedings has been transmitted to this Court in its entirety by the Clerk of the Oklahoma Supreme Court.

Petitioner thereafter perfected his appeal to the Oklahoma Court of Criminal Appeals and in an unpublished opinion (App. 57) dated March 8, 1979, the court affirmed the aforesaid judgment and sentence.

From the unpublished decision of the Oklahoma Court of Criminal Appeals, Petitioner seeks appropriate review to this Court.

JURISDICTION

The authority of this Court to review the initial Judgment and Sentence entered at the trial court level, together with the unpublished opinion of the Oklahoma Court of Criminal Appeals, is authorized by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions cited by Petitioner at pages 2-4 of his brief, Respondent additionally submits the following:

21 O.S. § 927:

"Where the jury finds a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare punishment and render the judgment accordingly."

22 O.S. § 1066:

"The Appellate Court may reverse, affirm, or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court."

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law when the Oklahoma Court of Criminal Appeals failed to remand this cause for jury sentencing anew upon its determination that Petitioner had been sentenced under a portion of Oklahoma Habitual Criminal Act rendered unconstitutional in *Thigpen* v. *State*, 571 P.2d 447 (1977), where no statutory enactment existed for empaneling a jury to redetermine punishment following appellate review?

2. Whether the failure of a statute to provide meaningful standards to guide the determination of a discretionary sentence in a noncapital offense violates the Due Process Clause of the Fourteenth Amendment?

3. Whether the imposition of a mandatory forty (40) years imprisonment assessed by a jury against Petitioner as a third-time offender was excessive and violative of the Eighth Amendment prohibition against cruel and unusual punishment?

4. Whether Petitioner's classification as a third-time offender under the Oklahoma Habitual Criminal Act, 22 O.S. Supp. 1977, § 51(B), operated to deny him of an asserted right to be resentenced anew when the Oklahoma Court of Criminal Appeals determined that the statute under which the jury was instructed to impose sentence was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

The textual portion of Petitioner's Statement of the Case (Brief of the Petitioner at 6-12) is adequate.

However, Petitioner incorrectly relates to this Court at page 10 of his Brief that Petitioner was not given an opportunity to present evidence to the jury in mitigation of punishment. On the contrary, Petitioner elected to stand mute as did co-defendant Jones during the bifurcated stage of the sentencing proceeding at the trial court level (App. 19).

Although Petitioner was convicted by the jury on April 14, 1977, the court did not pronounce sentence in accordance with the verdict until April 21, 1977. On that date, the court inquired of Petitioner as to whether he desired to make any statements to the court prior to pronouncement of judgment. Petitioner's only response was that he was "innocent" (App. 34).

Further, Respondent would not agree with Petitioner's contention at page 10 of his Brief (as later argued) that the provisions of 22 O.S. § 926 required the Oklahoma Court of Criminal Appeals to remand this cause to the District Court for a new trial on sentencing.

Petitioner was afforded appellate review to the Oklahoma Court of Criminal Appeals at public expense. The Public Defender's Office duly prepared and filed a brief on behalf of Petitioner. The court entered its written findngs in an unpublished opinion filed on March 8, 1979. Thereafter, Petitioner, acting *pro se*, filed a Petition for Rehearing which was denied. Thus, there can be no allusion of secrecy

displayed on the part of the Oklahoma Court of Criminal Appeals as contended by Petitioner.

The record of proceedings conducted at the trial court level, including the transcript, and all pleadings filed subsequent to the imposition of judgment and sentence are before this Court to assist in a correct determination of the factual allegations which, through subtle innuendos, have been distorted by Petitioner to create the appearance of a mammoth conspiracy on the part of the State of Oklahoma to send a seemingly innocent man to the penitentiary in derogation of his constitutional rights.

SUMMARY OF ARGUMENT

I. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. *The failure of the Oklahoma Court of Criminal Appeals to remand this cause for jury sentencing anew for imposition of punishment under 21 O.S. Supp., § 51(A), did not constitute a denial of due process.* Oklahoma does not guarantee an individual the right to be resentenced anew by a jury following appellate review, nor does the due process clause of the United States Constitution mandatorily require such a procedural protection. *Rose* v. *Hodges*, 423 U.S. 19. The invalidation of a portion of one section of a statute does not affect the remaining provisions of the statute if the overall legislative intent may be carried out. *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210. The Oklahoma Court of Criminal Appeals correctly found the absence of a fundamental error and exercised its

discretionary authority in affirming the sentence where no statutory vehicle existed for the empaneling of a new jury to determine sentence. 22 O.S. § 1066.

B. *The Due Process Clause does not extend the procedural requirements of notice, a hearing and an opportunity to present mitigating circumstances beyond the trial court level to encompass appellate review affirming the initial imposition of sentence.* There is no constitutional right under the Due Process Clause of the Federal Constitution to a hearing or oral argument. *Price* v. *Johnston,* 334 U.S. 266. Petitioner was given notice, a separate hearing and an opportunity to present circumstances in mitigation of punishment to the jury at the trial level. *Oyler* v. *Boles,* 368 U.S. 448. This is the essence of due process.

C. *Failure of a statute to provide meaningul standards to guide the determination of a discretionary sentence in a noncapital offense does not violate the Due Process Clause of the Fourteenth Amendment.* Legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases. *Lockett* v. *Ohio,* 438 U.S. 586. Individualized sentencing in criminal cases has long been recognized. *Williams* v. *New York,* 337 U.S. 247. The State of Oklahoma affords an individual adequate procedural protections to prevent the arbitrary and capricious imposition of punishment which is disproportionate to the seriousness of the offense.

D. *The opinion of the Oklahoma Court of Criminal Appeals contained a sufficient rationale to support the affirmance of Petitioner's punishment.* The Court of Criminal Appeals' affirmance of punishment was not a resentencing

proceeding. *Rose* v. *Hodges,* 423 U.S. 19. Petitioner was sentenced by a jury upon a record sufficient to support the sentence.

II. THE IMPOSITION OF FORTY (40) YEARS IMPRISONMENT ASSESSED AGAINST PETITIONER AS A THIRD-TIME HABITUAL OFFENDER UNDER THE OKLAHOMA HABITUAL CRIMINAL ACT, 21 O.S. SUPP. 1977, § 51(A), WAS NOT EXCESSIVE NOR DISPROPORTIONATE TO THE PRIOR CRIMES; AND, THUS, SUCH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. *The term of imprisonment bears a rational relationship to the goal of the Oklahoma Legislature to provide enhanced punishment for habitual criminal offenders and, therefore, does not constitute the needless imposition of pain and suffering.* A sentence of imprisonment has never been held to be cruel and unusual solely on the basis of length. *Howard* v. *Fleming,* 191 U.S. 126. Petitioner's forty (40) year punishment was not disproportionate to his three prior convictions and reasonably related to the Legislature's goal of protecting society from a habitual offender by providing enhanced punishment. *Gregg* v. *Georgia,* 428 U.S. 153.

B. *The Court of Criminal Appeals did not arbitrarily and capriciously impose punishment in violation of the Eighth Amendment prohibition against cruel and unusual punishment.* Unless the Court of Criminal Appeals can determine that the sentence is so excessive as to shock the conscience of the court, there is no power to modify the sentence. *Holding* v. *State,* 568 P.2d 332 (Okl.Cr. 1977).

III. PETITIONER'S CLASSIFICATION AS A THIRD-TIME OFFENDER AND SUBJECT TO PUNISHMENT PRESCRBED BY 22 O.S. 1977, § 51(B), DID NOT DEPRIVE HIM OF FEDERAL AND STATE GUARANTEED RIGHTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Oklahoma Legislature properly singled out a classification of individuals as habitual offenders and within that classification made a distinction between the punishment for second felony offenders and that punishment for third or subsequent offenders. *San Antonio School Dist.* v. *Rodriguez,* 411 U.S. 1. The sub-classification of third-time habitual offenders under Section 51(B) did not operate to deprive those individuals of any state or federal right exercised by offenders subject to punishment under Section 51(A), even though Section 51(B) was declared unconstitutional subsequent to Petitioner's conviction.

ARGUMENT

I. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. The Failure of the Oklahoma Court of Criminal Appeals to Remand This Cause for Jury Sentencing Anew for Imposition of Punishment Under the Provisions of 21 O.S. Supp. § 51(A) Did Not Constitute a Denial of Due Process.

Petitioner's initial argument emphasizes that the invalidation of Section 51(B) of the Oklahoma Habitual Criminal Act by the Oklahoma Court of Criminal Appeals in the decision of *Thigpen* v. *Oklahoma,* 571 P.2d 467 (1977), resulted in Petitioner's initial forty (40) year sentence being rendered absolutely void and of no effect.[1]

However, the crux of Petitioner's assertion is that by upholding the original sentence and finding it to be within the realm of the remaining provision of Section 51(A) of the Act, the Oklahoma Court of Criminal Appeals in effect became a jury of twelve men and, thus, deprived Hicks of his right to be sentenced by a jury pursuant to 22 O.S.

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[1] Petitioner supports this position by citing three cases, namely *Brown* v. *State,* 24 P.2d 1013 (1933); *Karns* v. *State,* 224 P. 373 (Ok.Cr. 1924); and *Ex Parte Lange,* 18 Wall. 163, 85 U.S. 872, 879. In *Brown,* supra, and *Karns,* supra, the Court of Criminal Appeals determined that the Oklahoma Legislature's attempt to punish an individual for the operation of a distillery exceeded the constitutional limitations of punishment, *i.e.,* reclassifying the crime from a misdemeanor to a felony and providing for increased punishment. Therefore, the Legislature had no authority to prohibit or punish an offender by enacting legislation in conflict with the constitution. Such is not the case in the instant action.

§ 926,[2] in violation of the due process clause of the Fourteenth Amendment.[3]

In countering Petitioner's first proposal, the State would first submit that an individual's right to have his *sentence* determined by a jury is not embodied within the Due Process Clause of the Fourteenth Amendment or any other provision of the United States Constitution. Beginning with *Buchalter* v. *New York*, 319 U.S. 427, 429-430 (1943), this Court recognized that:

> ". . .the failure of a state to afford a particular defendant the benefit of established procedures under state law, may, however result in a denial of due process when the error made by the state court renders the state proceedings so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure."

The inherent fallacy in Petitioner's due process argument is his attempt to equate the recognized state procedural right under 22 O.S. § 926 to have a sentence imposed by a jury with an *asserted* right to be *resentenced anew* following appellate review of the judgment and sentence.

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[2] 22 O.S. § 926 provides:

> "In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant, assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided."

[3] This method of sentencing is not absolute. 21 O.S. § 927 provides:

> "Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly."

Since the rendition of the *Thigpen* decision, supra, the Oklahoma Court of Criminal Appeals has been required to review a number of cases questioning the imposition of punishment under Section 51(B) of the Oklahoma Habitual Criminal Act. The relevant portion of the *Thigpen* decision determined as follows:

> "We are of the opinion that it was the legislative intent in enacting the provisions of 21 O.S. Supp. 1976, §51(A) and §51(B), to authorize progressively greater punishments for habitual criminals; Section 51(B), however, is so vague and illusory when construed with Section 51(A) that it cannot be construed in such a manner as to implement the legislative intent, and because of its vagueness and demonstrated defects we are of the opinion that 21 O.S. Supp. 1976, §51(B), is unconstitutional and that the trial court would have erred had an instruction been given thereunder."

The Oklahoma Court went on to add:

> "Since the provisions of 21 O.S. Supp. 1976, §51, contain a severability clause, our holding today in no way impairs the validity of 21 O.S. Supp. 1976, §51 (A)."

It may, therefore, be seen that Petitioner's initial conclusion that his sentence was void and of no effect is questionable; and, clearly, Petitioner's averment that he was sentenced under an entirely different statute is clearly erroneous. The general rule remains that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute.[4]

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[4] *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 76 L.Ed. 1063; *Williams* v. *State*, 542 P.2d 554, *vacated*, 428 U.S. 907, 49 L.Ed. 2d 1215, *on remand*, 554 P.2d 109 (1975); *Potter* v. *State*, 509 P.2d 933 (1973).

It should be remembered that this Court has never recognized a constitutional right to be sentenced anew following appellate review. This position was alluded to in the case of *Rose* v. *Hodges,* 423 U.S. 19, wherein respondents urged their Fourteenth and Sixth Amendments right to jury trial had been infringed when the Governor commuted their sentence of death following *Furman,*[5] to a term of 99 years.

In *Rose,* supra, this Court clearly distinguished between a federally protected right to a jury trial under the Sixth Amendment and the Fourteenth Amendment and an *asserted* right to be sentenced anew. The language used by this Court in the body of the *Rose* opinion, supra, noted:

> "Neither *Furman*[6] nor any other holding of this court requires that following such a commutation the defendant shall be entitled to have his sentence determined anew by a jury."

However, in support of his position, Petitioner relies heavily on the Eighth Circuit decision of *Klimas* v. *Mabry,* 599 F.2d 842 (1977), as a case presenting facts "strikingly similar" to Petitioner's situation. Klimas was charged by the State of Arkansas as a habitual offender.[7] The jury

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[5] *Furman* v. *Georgia,* 408 U.S. 238 (1972), *reh. den.,* 409 U.S. 902.

[6] *Id.* See Note 5.

[7] Ark. Stat. Ann. § 43-2328 provides:

> *"Second or subsequent convictions — Sentence.* — Any person convicted of an offense, which is punishable by imprisonment in the penitentiary, who shall subsequently be convicted of another such offense, shall be punished as follows:
>
> "(1) If the second offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one (1) year more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for this offense, unless the maximum sentence is less than the minimum sentence plus one (1) year, in which case the longer term shall govern.
>
> "(2) If the third offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than three (3) years more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for the offense, unless the maximum sentence is less than the minimum sentence plus three (3) years, in which case the longer term shall govern.
>
> "(3) If the fourth or subsequent offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent offense for a determinate term not less than the maximum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than one and one-half (1½) times the maximum sentence provided by law for a first conviction; provided, that any person convicted of a fourth or subsequent offense shall be sentenced to imprisonment for not less than five (5) years."

in the *Klimas* case imposed a term of sixty-three (63) years imprisonment based upon the State's presentation during the second stage sentencing hearing of seven previous felonies in the State of Missouri and six petty burglary offenses in the State of Arkansas.

Klimas appealed his conviction and sentence to the Arkansas Supreme Court; and in its initial opinion, the court remanded the case for a new trial for the reason that the Missouri convictions were inadmissible in the senten-

cing enhancement proceeding because the convictions were silent concerning his representation by counsel. On rehearing, however, the Arkansas Court modified the punishment of Klimas to forty-two years by calculating the sentence under the Arkansas Habitual Criminal Act on the basis of the six petty burglary convictions rendered in the State of Arkansas.

Klimas subsequently filed for writ of habeas corpus in federal district court, alleging a denial of due process by reason of the denial of the Arkansas Court to remand for sentencing anew. The district court subsequently dismissed the action for lack of jurisdiction.

The Eighth Circuit on review of the lower court's dismissal determined that under the particular facts of the case, the failure of the Arkansas Supreme Court to follow the sentencing procedure required by the Arkansas Habitual Criminal Act,[8] Ark. Stat. Ann. § 41-1005 or § 43-2330.1,

[8] Ark. Stat. Ann. § 41-1005 or § 43-2330.1 provide as follows:

§ 41-1005:

"Procedure for imposing sentence to extended term of imprisonment. — The following procedure shall govern trials at which a sentence to an extended term of imprisonment is sought pursuant to Section 1001 [§ 41-1001]:

"(1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilty or innocence on this charge.

"(2) If the defendant is found guilty of the felony, the same jury shall sit again and hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.

"(3) The jury shall retire again, and if it finds that the defendant has previously been convicted or found guilty of two [2] or more felonies, the jury shall consider the previous convictions or findings of guilt in determining the sentence to be imposed for the felony of which the defendant currently stands convicted."

§ 43-2330.1:

"Trial procedure for habitual criminals. — The following trial procedure shall be adhered to in cases involving habitual criminals:

"(1) The jury shall first hear all of the evidence pertaining to the current charge against the defendant and shall retire to reach its verdict, as to this charged, based only upon such evidence; provided, however, that nothing herein shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his own defense.

"(2) If the defendant is found guilty, the same jury shall sit again and hear evidence of defendant's prior conviction(s). Provided, that the defendant shall have the right to deny the existence of any prior conviction(s), and to offer evidence in support thereof.

"(3) The jury shall again retire, and if it is found that the prior conviction(s) exists, or if the defendant admits such previous conviction(s) then the prior conviction(s) shall be considered in fixing the punishment for the current offense for which the defendant has been convicted in accordance with Section 1 [§ 43-2328] hereof."

The foregoing sections of the Arkansas Habitual Criminal Act were specifically enacted by the Legislature to govern the sentencing provisions of a habitual offender. Oklahoma has no such controlling statute which would govern the procedural aspects of jury sentencing other than the general provisions of 22 O.S. § 926.

in the resentencing of Klimas after the rehearing of his case resulted in a deprivation of due process which justified the granting of habeas relief. The Circuit Court further stated at page 849:

> "Retrial of a criminal defendant on a habitual criminal charge may be a futile gesture where evidence of convictions, which was properly submitted to the jury, is unchallenged by the defendant. See, e.g., *Roach* v. *State*, 255 Ark. 773, 503 S.W.2d 467, 471 (1973). In

this case, however, Klimas's right to a retrial of the habitual offender charge is of importance since the provisions of the Arkansas Habitual Criminal Act were changed between the time of his state court trial and the time of the modification of his sentence by the Arkansas Supreme Court."

The change in the status of the Arkansas Habitual Criminal Act substantially affected the minimum and maximum penalty which Klimas could conceivably receive at a new sentencing proceeding. Therefore, the Eighth Circuit determined that there existed *substantial prejudice* to Klimas by reason of the Arkansas Supreme Court's failure to afford Klimas a new sentencing proceeding.

The Oklahoma Habitual Criminal Act had not been modified at the time Hicks' case was reviewed by the Oklahoma Court of Criminal Appeals, although a portion of the Act remained inoperative as a result of the *Thigpen* decision.

In addition, the record reviewed by the Court of Criminal Appeals contained sufficient evidence of prior convictions to warrant the imposition of forty (40) years as distinguished from the Eighth Circuit's finding in Klimas that it was impossible to determine from the jury's verdict which three prior offenses were used by the jury to impose the enhanced sentence.[9]

[9] Respondent submits that there existed an underlying cause for the Eighth Circuit's decision to reverse the Arkansas Supreme Court in *Klimas, i.e.,* the inadmissibility of the six (6) Missouri convictions during the second stage. Thus, the finding by the Circuit of a denial of due process by reason of the Supreme Court's failure to remand for resentencing in accordance with state procedure was merely used as a

The State of Oklahoma does not propose to this Court that the sentence imposed by the Hicks jury would have remained consistent under an instruction of punishment pursuant to Section 51(A).

Respondent merely submits that the Oklahoma Court of Criminal Appeals exercised its authority consistent with its power to review[10] (a point which is not challenged by Petitioner) and determined from the entire record that the defendant was not sufficiently prejudiced to require modification of punishment.

By its own case law, the Oklahoma Court of Criminal Appeals has limited its power to modify sentences to those instances where it is apparent that an injustice has been done.[11]

[9] (Continued)
vehicle in order to accomplish justifiable relief. In other words, the Arkansas Supreme Court abused its discretionary power of review when it refused to remand the case in light of the existence of fundamental constitutional errors. In the case at bar, the Oklahoma Court of Criminal Appeals found no fundamental error to exist, and Respondent submits that this determination was entirely proper based upon a review of the entire record.

[10] 22 O.S. § 1066 provides in part:

"Power of appellate court — Return by clerk of lower court when new trial granted

"The Appellate Court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court."

[11] *Fritz* v. *State,* 128 P. 170 (1912).

Can this Court say that given the habitual criminal record of the Petitioner[12] the failure of the Court of Criminal Appeals to remand this cause for further sentencing constitutes a *substantial* denial of the rudimentary demands of fair procedure? Can this Court say that Petitioner was denied due process of law of a federally protected right when neither the Constitution or the laws of the State of Oklahoma demand sentencing anew? Such a determination cannot be measured in terms of years but must be weighed consciously with the fundamental rights of an accused to be afforded certain procedural safeguards consistent with due process in order to thwart the arbitrary and inconsistent acts committed by our system of criminal justice.

As Petitioner well concedes, not every deprivation of a liberty entitlement need rise to the level of constitutional protection.[13] The State of Oklahoma does not dispute the fact that Petitioner Hicks has been deprived of a protected liberty interest insofar as he is now under the custodial supervision of the Oklahoma Department of Corrections. Nor does the State cordially ignore the grievous loss which Petitioner must endure as a result of his failure to conform to the laws of this State. But when Petitioner attempts to correlate this admitted "grievous loss" in terms of years, then such a position cannot be determined under the auspices of a denial of due process, but such a determination must be examined in light of whether the evidence was sufficient to support the imposition and affirmance of pun-

[12]Unlike *Klimas*, there is no underlying attack upon the admissibility of the prior offenses committed by Hicks during the enhancement stage.

[13]*Goss* v. *Lopez*, 419 U.S. 565, 576, 580.

ishment which the Oklahoma Court was empowered by statute to do.[14]

The rudimentary demands of fairness embodied in the due process clause cannot be stymied at a particular point in the procedural development of a criminal case. But to extend the interpretation of the due process clause to a situation where a court of review allegedly reimposes punishment would clearly undermine the legislative posture of defining crimes and declaring appropriate punishment consistent with public policy and undoubtedly restrict appellate authority to modify, reverse, remand or affirm the decision of twelve jurors absent a clear showing of injustice.

For the above and foregoing reasons the State submits that the Petitioner was not denied due process of law by the failure of the Oklahoma Court of Criminal Appeals to remand for sentencing anew.

B. Petitioner Was Not Entitled to Notice, a Hearing or an Opportunity to Present Mitigating Evidence Before the Oklahoma Court of Criminal Appeals During Appellate Review; and, Therefore, No Violation of the Due Process Clause of the Fourteenth Amendment Resulted.

Flynn Noye Hicks was tried and convicted before a jury in Oklahoma County pursuant to his election under 22 O.S. § 926. Thereafter, a second stage sentencing proceeding was conducted; and, upon the conclusion of the

[14]Petitioner was afforded minimal due process prior to the verdict of guilty and imposition of punishment, *i.e.*, he was sentenced under a valid statute and in conformity with 22 O.S. § 926.

evidence, the jury retired and returned a sentence of imprisonment against Petitioner and co-defendant Jones.

The procedural aspects of the entire trial, including the second stage, are not contested by Petitioner as being fundamentally defective under the mandates of the Due Process Clause of the Fourteenth Amendment. Rather, Petitioner's due process argument encompasses the failure of the Oklahoma Court of Criminal Appeals to remand this cause for a new sentencing hearing subsequent to its finding that that portion of the Habitual Criminal Act under which the jury was instructed [§ 51(B)] was found to be unconstitutional in a prior unrelated case. The court refused to modify Hicks' sentence and concluded Petitioner was not sufficiently prejudiced to merit further proceedings at the trial court level.

Based upon the court's asserted reimposition of punishment under Section 51(A), Petitioner contends he was entitled to notice, a hearing and an opportunity to present mitigating circumstances *prior* to the decision of the Court of Criminal Appeals.

It may be seen that where an individual is charged by the State under a recidivist statute, the habitual criminal issue is "a distinct issue" on which a defendant "must receive reasonable notice and an opportunity to be heard." *Oyler* v. *Boles,* 368 U.S. 448, 452; *Chandler* v. *Fretag,* 348 U.S. 3, 8. Procedural due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. *And there must be findings adequate to make meaningful*

any appeal that is allowed.[15] *Specht* v. *Patterson,* 386 U.S. 605.

Respondent, therefore, acknowledges the basic concept that the separate sentencing process must satisfy the requirements of due process, limited, however, to only those proceedings arising at the trial court level. As stated by this Court in *Gardner* v. *Florida,* 430 U.S. 349, 354:

> "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."

However, Petitioner seeks to interpret these basic due process requirements as being applicable beyond the trial court level to encompass the situation where an appellate court, upon a review of the original judgment and sentence, renders an opinion modifying, or as Petitioner asserts, reimposes a sentence of punishment.

Petitioner in his brief presents expository authority as to what specific due process procedures are required in the context of imposition of a discretionary sentence.[16]

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[15]Petitioner does not attack the sufficiency of the record supportive of a meaningful appeal.

[16]*Boddie* v. *Connecticutt,* 401 U.S. 371, 378 (emphasis on nature of interest); *Woodson* v. *North Carolina,* 428 U.S. 280, 304 (emphasis on particular offender); *Morissey* v. *Brewer,* 408 U.S. 471 at 481 (requiring notice and hearing prior to parole or probation); *Mempa* v. *Rhay,* 398 U.S. 128 (requiring defendant be provided with copy of presentence report).

The State of Oklahoma again joins in the analysis[17] made by Petitioner and concurs that the sentencing stage of proceedings is embodied within the procedural protections of the Due Process Clause as delineated by the cited cases.

However, the critical and obvious distinction promulgated by the State of Oklahoma is that there is *no constitutional right to be resentenced anew* nor should the Due Process Clause be interpreted by this Court in this case to require such a procedural device.

Petitioner was afforded an opportunity to present mitigating factors to the jury prior to its determination of sentence (App. 19). He was represented by counsel during the sentencing stage and appointed counsel argued "that if you believe forty years for one sale of heroin is so excessive, so unfair, then sign the verdict form which says five to twenty years and zero dollars . . . We want your justice" (App. 22).

Prior to the actual imposition of sentence by the trial court, Petitioner was afforded his right of allocution. His only statement to the court was his emphatic portrayal of innocence to which the trial court replied: ". . . that's what the jury is all about" (App. 34).

How many opportunities must the State afford to a particular offender to persuade the trier of punishment to impose leniency in order to satisfy the fundamental pro-

[17]Not the ultimate conclusion reached by Petitioner that the Due Process Clause requires notice, an opportunity to a hearing and presentation of mitigating factors at the appellate level of review.

cedural protections of the due process clause? Petitioner has already been afforded three, *i.e.*, plea of leniency to the jury, to the trial court and an appellate review at public expense to the Oklahoma Court of Criminal Appeals.

The State of Oklahoma respectfully submits that it has adhered to the dictates of procedural due process in affording Petitioner every opportunity required by state and federal standards and, therefore, Petitioner's contention of error in this respect cannot be sustained.

C. Failure of a Statute to Provide Meaningful Standards to Guide the Determination of a Discretionary Sentence in a Non-Capital Offense Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioner urges this Court to rule as a matter of law that in noncapital cases, sentencing legislation must contain meaningful sentencing standards for the trial court or jury to follow when the statute provides for the imposition of an indeterminate sentence in noncapital cases.

Until now this Court has only required such standards to be embraced in sentencing legislation which provides for the penalty of death,[18] and in the decision of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), this Court reiterated:

> ". . . legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases."

[18]*Furman* v. *Georgia*, 408 U.S. 238; *Roberts* v. *Louisiana*, 428 U.S. 325; *Woodson* v. *North Carolina*, 428 U.S. 280; *Gregg* v. *Georgia*, 428 U.S. 153.

Petitioner concedes that the Legislature, not the courts, has the authority for determining the severity of sentences for various crimes.[19]

Assuming, *arguendo*, that the Court of Criminal Appeals did in fact *resentence* Petitioner under Section 51(A), which provides for a range of punishment from ten (10) years to life, the State of Oklahoma submits that the failure of the Oklahoma Legislature to include meaningful standards to guide the court in fixing punishment did not operate to fundamentally deprive Petitioner of due process of law.[20]

(*a*) As already noted in previous argument, the United States Constitution does not mandate the imposition or determination of punishment by a jury. However, the State of Oklahoma has statutorily created such a right; and, therefore, Petitioner must be afforded this procedural protection. The question remains, however, whether as part of the right to be sentenced by a jury, the sentence imposed against a noncapital offender must be guided by specific standards set out and authorized by statutory enactment.[21]

[19]*Gregg* v. *Georgia, Ibid* at 175-176:

> " 'In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people' . . . [T]he specification of punishments . . . 'are peculiarly questions of legislative policy.' "

[20]Respondent would likewise submit that even if the jury had been instructed to impose punishment pursuant to § 51(A) in this case, the lack of standards to guide their decision was equally not a denial of due process.

The answer to this question must begin with a discussion of the concept of individualized sentencing in criminal cases generally, which, although not constitutionally required, has been long accepted in this country. See *Williams* v. *New York*, 337 U.S. at 247-248; *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. at 55. In reviewing prior opinions of this Court dealing with the imposition of the death penalty, it is the apparent inability of a particular statute to permit this concept of individualized sentencing which has prompted the requirement that legislation contain specific guidelines for the jury or judge to consider either in aggravation or mitigation of punishment in a capital case. Clearly, the unique penalty of death has proffered a distinction by this Court between capital and noncapital cases.[22]

It is urged by Petitioner that two successive juries or the same judge in two successive cases could, within the "limits" set in Section 51(A), impose a life term for a person convicted of two separate charges of passing bad checks

[21]Petitioner argues that the "private interest" at stake is the loss of years of freedom incurred by Petitioner. Respondent, however, feels that the interest is much more narrowly confined to his asserted right to be sentenced by a jury in accordance with statutory guidelines and standards.

[22]In *Lockett* v. *Ohio*, 438 U.S. 586, note 13, this Court stated:

> "Sentencing in noncapital cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate to view regarding the authority of a State or of the Congress to fix mandatory minimum sentences for noncapital crimes."

in separate face amounts of $21.00 apiece, and then sentence the next defendant to ten years imprisonment for first degree manslaughter, second degree rape, or robbery with a dangerous weapon, even though he may have had dozens of prior felony convictions.

In theory, Respondent submits that such a possibility exists; but in practical application, such a conclusion is not only unfounded,[23] but undermines this Court's long recognition of a State's entitlement to assume that jurors confronted with the truly awesome responsibility of decreeing [punishment] for a fellow human [would] act with due regard for the consequences of their decision.[24] Clearly, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.

Thus, the State of Oklahoma submits that Section 51 (A) clearly follows the dictates of public policy; that being (1) the Legislative intent to provide progressively greater punishment for the habitual offender, and (2) the exercise of discretion either by judge or jury to afford individualized sentencing commensurate with the seriousness of the offense in proportion to the deserved punishment. To hold otherwise would create the existence of an inherent and fundamental deficiency in all decisions made by judge and jury.

(*b*) We next must deal with the procedures afforded by the State of Oklahoma to a noncapital offender who

[23]Petitioner does not cite specific instances where this proposed theory has resulted in such an impropriety.

[24]*McGautha* v. *California,* 402 U.S. at 208.

elects to have his punishment imposed by a jury. Oklahoma requires that an enhanced punishment be considered separate and apart from the issue of guilt or innocence. During the second stage, the defendant is allowed to present any evidence in mitigation of punishment or any evidence tending to attack the validity of the prior convictions produced by the prosecuting authority. Under the facts of this particular case, however, Petitioner Hicks elected to stand mute before the jury. The only procedural restriction placed upon a habitual offender in Oklahoma is the preclusion of a third-time or more offender to be afforded a pre-sentence investigation.

In addition to the aspects of sentencing at the trial level, Oklahoma makes available to the convicted offender the opportunity of direct appellate review, and post-conviction review[25] in order to have the initial sentence modified. Additionally, Petitioner has available such avenues as parole, earned good time credits, and statutory good time credits.

Unfortunately, and erroneously, in *Rogers* v. *Britton,* 476 F.Supp. 1036 (E.D. Ark. 1979)[26] (a recent case cited

[25]22 O.S. § 1080, *et seq.*

[26]*Rogers* v. *Britton* involved a 17-year-old black male convicted of forcible rape of a 21-year-old white woman. Rogers had no prior criminal record and his sentence imposed by a jury was life without parole. The range of punishment was thirty (30) years to life. The court in reversing the decision determined that the sentence violated due process in that the jury was given no guidelines or standards to follow. In so doing, the court applied an analytical framework espoused by this Court in *Parham* v. *J.L.,* ___ U.S. ___, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), found at page 117 of the opinion. Respondent respectfully submits

in point by Petitioner), the United States District Court for the Eastern District of Arkansas determined that these procedures created a high risk of an erroneous determination. In doing so the District Court cited the public's need to have some assurance that the punishment set by the jury was based upon intelligible and neutral principles. Clearly, such a conclusion presupposes a freakish and arbitrary attitude which must necessarily be embodied in the minds of every juror or judge. Even assuming the jury was guided by specific standards when it imposed a life sentence against petitioner Rogers, under the District Court's own logic, "the jury could still have secretly disregarded them" (*Id.*, at 1042).

(c) As noted in *Rogers* v. *Britton*, supra, "requiring the articulation and application of sentencing standards before a verdict of life imprisonment is returned would impose some additional burden on the State." The position of the State of Oklahoma to this Court simply questions the need for sentencing standards under the structure of our criminal procedure. No burden is too great which ensures the viability of our criminal system of justice. On the other hand, Respondent fails to see the inherent deficiency alluded to by the Petitioner in allowing judge or jury to exercise its discretion in meting out punishment to the individual offender[27] without the assistance of specific guidelines.[28]

[26](Continued)
that the application of this standard by the district court to the *Rogers* case was in error. *Parham* dealt with the right of parents to commit their child to a mental institution and the validity of state procedures facilitating voluntary commitment. This Court reversed the decision and found Georgia's commitment procedures to be valid and not a violation of the due process clause.

In summation, Petitioner has not presented evidence which is clear and convincing that the discretion exercised by a judge or jury in fixing punishment against a habitual noncapital offender is anything less than a deliberate and good faith adjudication of a sentence deserved by the individual offender.

The State of Oklahoma submits that the imposition of punishment pursuant to Section 51(A) does not contravene fundamental due process procedures in total deference to the rights of the accused.

D. The Opinion of the Court of Criminal Appeals Contained Sufficient Rationale to Support the Affirmance of Petitioner's Sentence.

Petitioner intimates that the Oklahoma Court of Criminal Appeals violated due process when it failed to offer any rationale or basis for the "sentence" that it imposed against Petitioner. This analysis need only be reviewed within the context of the written but unpublished opinion of the Oklahoma Court in this case and the record which the court had before it on review. A summary examination reveals the court concluded that (1) the sentence was

[27]Unlike the State of Texas, Oklahoma does not prescribe mandatory life imprisonment for the habitual offender. *Rummel* v. *Estelle*, 568 F.2d 1193 (5th Cir. 1978), *rev'd* on rehearing *en banc*, 587 F.2d 651 (5th Cir. 1978), *remanded* on another issue, 590 F.2d 103 (5th Cir. 1979), *cert. granted*, ___ U.S. ___, 99 S.Ct. 2403, 60 L.Ed.2d 1064 (1979).

[28]*Ibid.*

well within the range of punishment established by the remaining provision of the Oklahoma Habitual Criminal Act under Section 51(A); (2) that Petitioner was not substantially prejudiced as a result of the jury's being instructed under Section 51(B); (3) that under the facts and circumstances of the case the punishment was not clearly excessive; and (4) that the court extended its rationale set forth in *Thigpen* v. *State*, 571 P.2d 447 (1977), to meet Petitioner's meritorious claim of the unconstitutional nature of Section 51(B).[29]

Clearly, a record on appeal void of sufficient facts to afford an adequate basis for affirming the judgment and sentence, must necessarily fail as an arbitrary and capricious exercise of discretion.

Respondent would, therefore, contest that the Oklahoma Court of Criminal Appeals constituted the "sentencing body" and was required to set forth a basis for their decision.

Even assuming this theory to be accurate,[30] the unpublished opinion was more than adequate for this Court to find a rational basis for their decision, or as Petitioner requests, an "explanation affording acceptance to that which we better understand."

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[29]See Note 43, *infra*.

[30]Petitioner applies a tripartite test under *Mathews* v. *Edridge*, 424 U.S. 319, 335, and *Goldberg* v. *Kelly*, 397 U.S. 254, 263-271, to evaluate whether due process requires a sentencing judge to state the reasoning behind his sentence. Under such a test, would Petitioner require this Court to set forth a written basis for its refusal to accept a particular case for review on Petition for Writ of Certiorari?

II. THE IMPOSITION OF FORTY (40) YEARS IMPRISONMENT ASSESSED AGAINST PETITIONER AS A THIRD-TIME HABITUAL OFFENDER UNDER THE OKLAHOMA HABITUAL CRIMINAL ACT, 21 O.S. SUPP. 1977, § 51 (A), WAS NOT EXCESSIVE, AND, THEREFORE, DOES NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. The Term of Imprisonment Bears a Rational Relationship to the Goal of the Oklahoma Legislature to Provide Enhanced Punishment for Habitual Criminal Offenders and, Therefore, Does Not Constitute the Needless Imposition of Pain and Suffering.

Petitioner initially contends that Section 51(A) does not "rationally" relate to the acceptable goals of punishment or make a "measurable contribution" to such goals,[31] and, therefore, constitutes the cruel and unusual imposition of punishment which is expressly prohibited by the Eighth Amendment.[32]

The prior decisions of this Court have recognized that the Cruel and Unusual Clause circumscribes the criminal process in three ways: *first*, it limits the kinds of punishment that can be imposed on those convicted of crimes, *e.g.*,

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[31]See page 63, Petitioner's Brief.

[32]This Court has never held a sentence of imprisonment to constitute cruel and unusual punishment solely because of its length. The issue was considered in *Howard* v. *Fleming*, 191 U.S. 126; and, recently, the Fourth Circuit, sitting en banc in the case of *Davis* v. *Davis*, 585 F.2d 1226 (1978), en banc 601 F.2d 153 (1979), held that the imposition of a forty (40) year term of imprisonment and a $20,000.00 fine for the sale of nine ounces of marijuana were so disproportionate to the offense as to amount to cruel and unusual punishment in violation of the Eighth Amendment.

Estelle v. *Gamble,* 429 U.S. 97 (incarceration without medical care); *Trop* v. *Dulles,* 356 U.S. 86 (expatriation for desertion); *second,* it proscribes punishment grossly disproportionate to the severity of the crime, *e.g., Weems* v. *United States,* 217 U.S. 349 (15 years' imprisonment and other penalties for falsifying an official document); *Coker* v. *Georgia,* 433 U.S. 584 (execution for offense of rape); and *third,* it imposes substantive limits on what can be made criminal and punishment as such, *e.g., Robinson* v. *California,* 370 U.S. 660 (incarceration as a criminal for addiction to narcotics).[33]

Respondent submits that the instant case falls within the second category of decisions which prohibits grossly disproportionate punishment when measured against the severity of the crime.[34]

Thus, the controlling standard which is applicable to *this* particular case and determinative of whether the punishment in *this* particular case is excessive is agreeably governed by the test reaffirmed in *Coker* v. *Georgia,* 433 U.S. 584 at 592, wherein Mr. Justice White enumerated:

> "[A] punishment is 'excessive and unconstitutional if it (1) makes no measurable contribution to the accepted goals of punishment and hence is nothing more

[33]See *Ingraham* v. *Wright,* 430 U.S. 651 (1978).

[34]Although Petitioner candidly disputes the advancement of an argument setting forth the contention that the forty (40) years assessed in the case at bar is *per se* excessive, Petitioner does contend that in *this* case under *this* particular statute the punishment is excessive in that (1) the sentence makes no measurable contribution to acceptable goals of punishment and (2) because it was imposed in a reckless and arbitrary manner. See footnote 30, pages 61-62 of Petitioner's Brief.

> than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.' A punishment might fail the test on either ground."

Using this standard, Petitioner proceeds to enumerate four acceptable goals of punishment which this Court has identified on various occasions, *e.g.,* (1) rehabilitation, (2) deterrence, (3) isolation, and (4) retribution.

Rehabilitation — Under the theory of rehabilitation Petitioner contends that he cannot be subjected to enhanced punishment unless his prior convictions resulted in the imposition and the *serving* of actual jail time. Petitioner queries whether it can "rationally" be determined that an enhanced punishment is necessary or even useful if a normal prison term has not been tried first.

Petitioner likens the sentence rendered against him to a child threatened with spanking for telling lies, but when such threats fail to alter the child from a continued path of prevarication and on the telling of a third lie, a whiplashing results. We are not, however, dealing with a child's mentality in this case, but a 28-year-old male adult offender previously convicted of Assault and Battery with Intent to Kill and Second Degree Burglary. Thus, the so-called primary consideration of rehabilitation must necessarily be overridden by the interest of the Legislature to protect society from an individual who has exhibited a total disregard for the law on a continued basis. Taking Petitioner's argument to the other extreme would allow an offender to commit two murders before the sentence of death could be imposed for a third murder.

The State of Oklahoma, therefore, submits that the rationale of the Habitual Criminal Offender Act is predicated upon the failure of a repeat offender to heed the warnings of society to either conform or pay the penalty, not rehabilitation. To say that Petitioner is entitled to rehabilitation through incarceration before being subjected to enhanced punishment is in total abhorrence of the legislative intent and presupposes that incarceration is a guaranteed means of preventing future acts of criminal conduct. So long as Petitioner engaged in a course of criminal conduct, with a full understanding of the punishment he could receive, there can be no rational exception to his exposure to the full extent of punishment. In essence *there is no constitutional right to rehabilitation through incarceration,* and that is exactly what Petitioner would have this Court determine.

Deterrence — The constitutionality of recidivist statutes have long been upheld by this Court.[35] However, Petitioner argues that Section 51(A) makes no effort whatsoever to fit the punishment to the crime. It should be remembered that the legislative function primarily involves a determination of what constitutes a crime and the establishment of penalties for the commission of that crime,[36] and in

[35]*Oyler* v. *Boles,* 368 U.S. 448 (1961); *Gryger* v. *Burke,* 334 U.S. 728 (1948); *Graham* v. *West Virginia,* 224 U.S. 616, 623 (1912); *McDonald* v. *Massachusetts,* 180 U.S. 311, 312 (1901); *Moore* v. *Missouri,* 159 U.S. 673 (1895); *Wilson* v. *Slayton,* 470 F.2d 986 (4th Cir. 1972); *Wessling* v. *Bennett,* 410 F.2d 205 (8th Cir. 1969); *Price* v. *Allgood,* 369 F.2d 376 (5th Cir. 1956), *cert. den.,* 386 U.S. 998 (1967); see generally, Katkin, *Habitual Offender Laws: A Reconsideration,* 21 Buffalo L. Rev. 99 (1971).

[36]*Gregg* v. *Georgia,* 428 U.S. 153 at 175.

this connection, Petitioner proposes a number of acceptable formulas whereby the Legislature could differentiate between the extent of the punishment and the seriousness of the offense. It has equally been the recognized rationale that a punishment which allows the jury a wide range of years is much better suited to the individual offender and his presentation of mitigating factors or lack thereof, in arriving at his sentence. This result is clearly indicated when compared to those cases cited in the *Thigpen* decision[37] as well as sentences pronounced by courts and jurys throughout the country where the statute allows punishment within a wide number of years.

It may also be seen that the controversy surrounding the deterrent value of punishment has been exceedingly questioned by this Court in recent cases, specifically in instances involving the imposition of the death penalty. In *Gregg* v. *Georgia,* 428 U.S. 153, this Court noted the words of Lord Justice Denning[38] at page 381:

> "Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment

[37]The appendix in *Thigpen* v. *State,* 571 P.2d 467 (Okl.Cr. 1977) gives examples such as the verdict of 999 years upon conviction of Robbery with Firearms after a former felony conviction. Other sentences for the same offense varied from 99 years, 59 years, and 40 years.

[38]Master of the Rolls of the Court of Appeal in England; Royal Commission on Capital Punishment, Minutes of Evidence, December 1, 1949, p. 207 (1950).

> as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, *because the wrong-doer deserves it,* irrespective of whether it is a deterrent or not." (Emphasis added)

Thus, it can be logically inferred that in the case of a habitual criminal the deterrent aspect is of much less importance in that the penalties punish the "status" of a repeat offender in order to afford society adequate protection. One is no less deserving of punishment even if the primary intent of the legislation is to deter further acts of criminal violence.

In summation, the only acceptable formula which can be promulgated in comparing punishment with the seriousness of the offense, must remain flexible; and although the jury may arguably be saddled with unbridled discretion; it cannot be said that in the majority of cases the decision of the jury to impose a sentence within the limits of the statute has been contra to the rudimentary demands of justice and fair play.

Isolation and Retribution — The State of Oklahoma would merely submit that in this particular case Petitioner Hicks exhibited conduct which required isolation from the outside world and past criminal acts deserving of punishment. It is apparent that Petitioner was neither intimidated or rehabilitated by reason of his prior confrontation with the criminal system of justice.

Petitioner increasingly alludes to the sentence received by his co-defendant. Although Jones received the minimum under 63 O.S. § 2-401, her sentence does not reflect a record

of prior convictions such as that displayed by Mr. Hicks.[39] Nor can this Court accordingly determine that the jury's pronouncement of the minimum sentence against the co-defendant in this cause infers an attitude of passion or sympathy. Clearly the Petitioner was no less deserving of forty (40) years than Jones was deserving of the minimum.[40]

In conclusion, the State of Oklahoma submits that the Eighth Amendment as construed by the decisions of this Court, is not shocked nor impassioned by the sentence of forty (40) years. A determination, on the basis of length alone, that the sentence in this case, based upon the entire record, is a needless imposition of pain and suffering, lacks sufficient merit to afford a finding of a fundamental constitutional deprivation which would require modification.

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[39]For brevity purposes Respondent would adopt by incorporation its argument presented in its original brief to this Court opposing Writ of Certiorari, filed with this Court on September 15, 1979, beginning at page 12. Therein Respondent sets forth penalties enacted by other states which are equivalent to Oklahoma's statutory scheme of punishment for habitual offenders, as well as additional case authority and argument with respect to the application of the standard of disproportionality to the punishment compared with the seriousness of the offense.

[40]There is no constitutional requirement that persons convicted of the same crime receive identical penalties. *Schnider* v. *People of State of Cal.*, 427 F.2d 1178, *cert. den.*, 401 U.S. 929.

B. The Court of Criminal Appeals Did Not Arbitrarily and Capriciously Impose Punishment in Violation of the Eighth Amendment Prohibition Against Cruel and Unusual Punishment.

Petitioner adapts basically the same argument presented under his due process contention in Proposition I of his Brief to a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

The State of Oklahoma would merely submit that barring the finding of a fundamental error, the Court of Criminal Appeals is limited in its exercise of discretion to modify a judgment and sentence.[41]

The Court of Criminal Appeals has consistently held that the question of excessiveness of punishment must be determined by examination of all the facts and circumstances in each particular case. Further, unless the Court of Criminal Appeals can conscientiously say that under all facts and circumstances the sentence is so excessive as to shock the conscience of the court, it does not have the power to modify that sentence. See *Holding* v. *State*, 568 P.2d 332 (Okl.Cr. 1977); *Dodson* v. *State*, 562 P.2d 916 (Okl.Cr. 1977). In reviewing the reported decisions published by the Court of Criminal Appeals dealing with the imposition of sentence under Section 51(B),[42] as well as the unpublished opinions

[41] *Miles* v. *State*, 336 P.2d 930 (Okl.Cr.); *Simpson* v. *State*, 304 P.2d 1004; and *Woods* v. *State*, 292 P. 393.

[42] *Clonce* v. *State*, 588 P.2d 584; record shows jury was instructed under 21 O.S. Supp. 1977, § 51(B), that they could sentence the defendant to twenty-five (25) years. The jury, however, on a finding of guilt after one former conviction of a felony sentenced the defendant to ten

provided to this Court by Petitioner, it cannot be said that the standard of determining excessive punishment was ar-

[42] (Continued)
(10) years within the provisions of 21 O.S. Supp. 1977, § 51(A). The Court of Criminal Appeals *affirmed* Judgment and Sentence.

Coats v. *State*, 589 P.2d 693 (Okl.Cr.): defendant challenged on one of three convictions used by State during bifurcated sentencing proceeding which resulted in the jury imposing a sentence of 999 years. Court of Criminal Appeals sustained challenge to one prior conviction in that period of ten years had elapsed from time of commission of prior offense. Court *modified* sentence to fifty (50) years but otherwise affirmed.

Fischer v. *State*, 593 P.2d 507 (Okl.Cr. 1979): defendants argued that under 51(B) the maximum punishment for conviction would be 27 years as opposed to the discretionary sentence imposed under 51(A) by the jury against Clay of 37 and 30 years. The Court of Criminal Appeals *affirmed* Judgment and Sentence.

Kitchens v. *State*, 576 P.2d 775 (Okl.Cr. 1978): defendant sentenced by jury under Section 51(B). Court of Criminal Appeals *affirmed* sentence of 27 years holding defendant had not been prejudiced by use of this statute in light of *Thigpen* decision holding Section 51(B) unconstitutional.

Nepps v. *State*, 576 P.2d 310 (Okl.Cr. 1978): Court of Criminal Appeals *modified* sentence from 25 years to 12 years. Defendant had two prior felonies of Grand Larceny and subsequently was found guilty of Knowingly Concealing Stolen Property. The court specifically found no error other than relying on its decision of *Thigpen* v. *State*.

Barrett v. *State*, 573 P.2d 1221 (Okl.Cr. 1978): The trial court imposed a life sentence for offense of Rape in the First Degree After Former Conviction of a Felony. The Court of Criminal Appeals noted the language of trial court as desiring to sentence defendant to 10 to 15 years but instead felt bound by Section 51(A) to impose a sentence of life. The Court of Crimial Appeals found punishment to be excessive and *reduced* sentence to 15 years.

Drennon v. *State*, 581 P.2d 901 (Okl.Cr. 1978): defendant was charged, tried and convicted for offense of Attempting to Obtain Controlled Drugs by Forged Prescription, After Former Conviction of a

bitrarily and capriciously applied by the court to the detriment of defendant.[43]

Petitioner cannot possibly argue with merit that the sentence imposed by the Court of Criminal Appeals "struck with lightning", and, therefore, is "unusual", inasmuch as Petitioner was ably represented on appeal by the Public Defender's Office, and briefs were submitted by both parties on the issue of Section 51(B). This constitutes notice and

[42] (Continued)

Felony. His punishment was fixed at thirty (30) years. Based on its *Thigpen* decision, Court of Criminal Appeals *modified* sentence to twenty (20) years.

King v. *State*, 586 P.2d 756 (Okl.Cr. 1978): defendant was tried and convicted of Second Degree Burglary, After Former Conviction of a Felony. The jury, pursuant to Section 51(B), sentenced defendant to 27 years imprisonment. Court of Criminal Appeals *modified* sentence from 27 years to 18 years relying on *Thigpen*.

[43] See 20 O.S. § 3001, which provides:

> "*Harmless error.*—No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless it be the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a *substantial* violation of a constitutional or statutory right." (Emphasis added)

Although this section was repealed by the Oklahoma Legislature effective October 1, 1978, by the enactment of the Oklahoma Evidence Code, 12 O.S. § 2104, this particular statutory provision was alluded to by the Oklahoma Court of Criminal Appeals in *Thigpen*, supra; and Respondent submits that this doctrine of harmless error was applied in cases subsequent to *Thigpen* even though at the time the court reviewed Hicks' appeal, the statutory provision had been repealed.

an opportunity to be heard within the framework of the Due Process Clause.[44]

It is submitted by the State that so long as the record sufficiently justifies the sentence and the court is not overly shocked by the excessive nature of the penalty there can be no finding of cruel and unusual punishment in violation of the Eighth Amendment.

III. PETITIONER'S CLASSIFICATION AS A THIRD-TIME OFFENDER AND SUBJECT TO PUNISHMENT PRESCRIBED BY 22 O.S. 1977, § 51(B), DID NOT DEPRIVE HIM OF FEDERAL AND STATE GUARANTEED RIGHTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Under his final proposition of error, Petitioner asserts that the classification by the Oklahoma Legislature of habitual criminals under two sections of the Oklahoma Habitual Criminal Act, to-wit: Sections 51(A) and Section 51(B), operated to deprive Section 51(B) offenders of the right to be sentenced by a jury and, thus, resulted in a violation of the Equal Protection Clause of the Fourteenth Amendment. To demonstrate this violation, Petitioner applies two tests: (a) the traditional "rational basis" test and (b) the strict

[44] There is no constitutional right under the Due Process Clause of the Federal Constitution to a hearing or oral argument on appeal. *Galarza* v. *Jimenez Oxio*, 440 F.Supp. 47 (1977); *Price* v. *Johnston*, 334 U.S. 266 (1944). Petitioner was afforded the right to an appellate review by the State of Oklahoma at public expense. Therefore, the failure of the Court of Criminal Appeals to grant oral argument in Petitioner's case cannot form the basis for a claim of an arbitrary and capricious determination of punishment synonomous with the imposition of cruel and unusual punishment. *Weber* v. *United States*, 104 F.2d 300 (1939); *United States* v. *Koptik*, 300 F.2d 19 (1962).

scrutiny test. Petitioner's analysis contends that under both tests a constitutional deprivation of equal protection resulted.

(a) This Court has held that the Equal Protection Clause permits discrimination between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1. Under the so-called "rational basis" test, the Oklahoma Court of Criminal Appeals determined that Section 51(B) did not comport with the Legislature's rational goal of enhancement of punishment for habitual offenders. In doing so the court did not invalidate the *classification* of habitual criminals, as was noted in the Appendix to the *Thigpen* decision, which stated:

> "The legislature could, without committing constitutional error, single out a classification of persons who would be affected by legislation. This was what it intended to do by passage of that amendatory language contained in 21 O.S. 1976 Supp. § 51. The legislature could, further, within that classification relating to habitual offenders, make a distinction between the punishments for second felony offenders and that punishment for third or subsequent offenders. Such classification and sub-classification would have a reasonable relation to the obvious public purpose sought to be achieved by such legislation.
>
> "The finished product of the legislature did not do this, however."

The application of the traditional standard of review requires initially an analysis of the class identified by the statute and singled out for special treatment. Only where

that class exhibits involuntary characteristics such as alienage and race has this Court invalidated specific legislation as being inherently suspect and violative of the Equal Protection Clause. *Loving* v. *Virginia,* 338 U.S. 1; *Graham* v. *Richardson,* 403 U.S. 365.

To substantiate his analysis under the traditional "rational basis" test, Petitioner cites the Oklahoma Court's holding in *Thigpen* v. *State,* as a clear indication of a recognized unconstitutional classification, *i.e.,* habitual criminals prosecuted under Section 51(B).

In holding Section 51(B) unconstitutional, the Oklahoma Court of Criminal Appeals sought to protect those individuals sentenced under Section 51(A) from a denial of equal protection, not Section 51(B) offenders. The court found Section 51(B) vague and illusory when construed with the legislative intent of providing progressively greater punishment, in that the practical application of instructing the jury under Section 51(B) had a contra effect by limiting punishment. With the invalidation of Section 51(B), the class of violators in which Petitioner belonged was dissolved and all habitual offenders were placed in one category subject to a sentence ranging from ten years to life.

At this point it should be remembered that whether a habitual offender is sentenced under Section 51(A) or Section 51(B), there is no distinction between the procedures followed at trial for purposes of sentencing, *i.e.,* each offender is afforded a separate sentencing hearing before the jury, each is entitled to representation by counsel, and each is afforded the opportunity to present evidence in mitigation of punishment.

Petitioner does not advance the theory that the overall classification of Petitioner and others similarly situated as habitual criminals is unlawful.[45] Clearly, it was not Petitioner's classification as a habitual offender which deprived him of his liberty, but his own volitional acts of misconduct. Therefore, Petitioner's argument that Section 51(B) was an unlawful classification of habitual criminals is erroneous.

Once it has been established that the class singled out is not a prohibited classification nor inherently "suspect", then the only remaining consideration is whether there exists a rational basis, as opposed to a *compelling* state interest under the strict scrutiny test, to achieve the permissible object sought to be attained by the statute. That States have the authority to enact recidivist legislation classifying individuals as habitual criminals has long been abrogated to an unquestioned principle.

Clearly, the question then narrows and becomes whether the State of Oklahoma can advance a rational basis for depriving Section 51(B) offenders of the asserted right to being resentenced anew in light of the Court of Criminal Appeals determination that Section 51(B) was invalid.

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[45]Petitioner in Note 52 of his brief asserts that any argument based upon Petitioner's voluntary decision to commit additional offenses would "miss the point." Respondent submits that it is this very standard of voluntary control which is the distinguishing feature inherent in what this Court has recognized as a suspect classification subject to the "strict scrutiny" test. If in fact this Court determined that every criminal incarcerated was effectively denied his right to procreate, *i.e.*, a fundamental interest, then every criminal statute would be subject to the "strict scrutiny" test. Such being the case, the State's burden of coming forward with a compelling state interest, as opposed to a rational basis, would apply to every enactment of criminal legislation.

First, Oklahoma has no statutory vehicle for providing *any* criminal with a new penalty proceeding subsequent to appellate review. Even were the reviewing court, for some reason, to invalidate the punishment assessed by a jury under Section 51(A), the Section 51(A) offender would likewise have no asserted right to be resentenced anew.

Second, such a requirement would abrogate the inherent authority of the Oklahoma Court of Criminal Appeals to impartially review any judgment and sentence. 22 O.S. § 1066.

Third, the validity of a new sentence in excess of that initially rendered would create grave implications and on appellate review would conceivably result in a reduction to the first term of sentence.

Fourth, although the fiscal burden which might be incurred in resentencing Section 51(B) offenders would be minimal, the practical application would require a complete new trial in order for the jury to consider the underlying felony which resulted in the charge of "habitual offender."

In summation, the Oklahoma Legislature properly singled out a class of individuals as habitual criminals for the purpose of enhancing their punishment. Neither those offenders sentenced under Section 51(A) or Section 51(B) were denied or afforded any additional procedural right which was guaranteed by the laws or the State of Oklahoma or the Constitution of the United States, thereby creating an equal protection violation.

(b) Under Petitioner's second test, "strict scrutiny", this Court is urged to review Oklahoma's holding as the creation of a suspect classification impinging upon Petitioner's fundamental liberty interests.

In support of his contention, Petitioner cites this Court's rulings in *Loving* v. *Virgina*, 338 U.S. 1; *Graham* v. *Richardson*, 403 U.S. 365, and *Glona* v. *American Guarantee & Liability Ins.*, 391 U.S. 73, all covering the subjects of race, alienage and illegitimacy and the corresponding discrimination associated therewith.

Even though Petitioner tries to use these cases as authoritative guidelines for this Court's use, a quick glance reveals no material similarity with the instant case. The defendant Hicks was not involuntarily classified as a habitual offender; it was not an accident of birth that caused two prior felony violations. Therefore, Petitioner's second test fails for lack of similarity to the equal protection afforded to the groups to which this Court's "strict scrutiny" test was intended to apply.

In conclusion, the Petitioner has been afforded all federal and state guaranteed rights of equal protection and, if any irregularity exists, that irregularity does not rise to the dignity of a substantial prejudice or of a constitutional violation of equal protection.

CONCLUSION

For the above and foregoing reasons, the State of Oklahoma submits that the Judgment and Sentence be affirmed and this Court deny Petitioner's request to be resentenced anew, or in the alternative, released from confinement.

Respectfully submitted,

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